

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals *United States Court of Appeals*
For the

FOR THE DISTRICT OF COLUMBIA CIRCUIT *District of Columbia Circuit*

FILED OCT 29 1956

No. 13,113

O'NEILL BROADCASTING COMPANY,
Petitioner,

Joseph W. Stewart
CLERK

v.

UNITED STATES OF AMERICA, and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents,
CALIFORNIA INLAND BROADCASTING COMPANY,
Intervenor.

No. 13,163

O'NEILL BROADCASTING COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA, and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents,
CALIFORNIA INLAND BROADCASTING COMPANY,
Intervenor.

No. 13,164

O'NEILL BROADCASTING COMPANY,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
CALIFORNIA INLAND BROADCASTING COMPANY,
Intervenor.

APPEAL FROM THE FEDERAL COMMUNICATIONS COMMISSION

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For The District Of Columbia Circuit

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APPEAL FROM THE FEDERAL COMMUNICATIONS COMMISSION

JOINT APPENDIX

(i)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Jan. 9, 1956]

O'NEILL BROADCASTING CO.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 13,113
	)	
UNITED STATES OF AMERICA	)	
	)	
and	)	
	)	
FEDERAL COMMUNICATIONS COMMISSION,	)	
	)	
Respondent.	)	

PETITION FOR REVIEW OF ORDER OF THE FEDERAL
COMMUNICATIONS COMMISSION

1. Petitioner, O'Neill Broadcasting Co., herein petitions this court to review the report and order of the Federal Communications Commission adopted and released November 10, 1955, attached hereto as Exhibit A, wherein the Commission denied without hearing or other process and without further proceedings and without consideration of its merits, a Petition for Rule-Making, filed with the Commission by petitioner herein.

* * * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Feb. 10, 1956]

O'NEILL BROADCASTING CO.,

Petitioner,

v.

UNITED STATES OF AMERICA

and

FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

Case No. 13,163

PETITION FOR REVIEW OF ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION
(Of January 12, 1956)

1. Petitioner, O'Neill Broadcasting Co., is a corporation organized and doing business under the laws of the State of California, with its principal office and place of business at Fresno, California, where it operates television station KJEO. Petitioner will hereinafter be referred to as "O'Neill.

O'Neill hereby petitions this Court to review the Memorandum Opinion and Order of the Federal Communications Commission released January 12, 1956, attached hereto as Exhibit A, wherein the Commission

(a) dismissed as moot a petition of O'Neill to hold in abeyance final action in the VHF Channel 12 proceedings in Fresno (FCC Dockets No. 9050 and 10650) until such time as certain other matters affecting the allocation of Channel 12 pending before the Commission and which may have required inconsistent action were determined, and until after the final determination of all matters pending before the Commission involving the reassignment of VHF Channel 12, so that no adverse action would be effected outside of the proceedings on O'Neill's then pending petition to reassign Channel 12; and

(b) denied O'Neill's petition for alternative relief which requested that the Commission either (i) consolidate the proceedings concerning

VHF Channel 12 with the general rule-making proceedings initiated by the Commission concerning the reallocation of television channels, or (ii) to permit O'Neill to intervene in the VHF Channel 12 proceedings with a remand for further hearing therein on certain specified issues as to whether a grant of the VHF channel at that time would be in the public interest, or (iii) hold in abeyance the general rule-making proceedings, or (iiii) in the event the foregoing petitions were denied, that the Commission make the final grant subject to a later assignment of the specific channel to be utilized, such channel assignment to be made after the completion of general rule-making proceedings, or that grant of the construction permit carry the condition that no construction be commenced until after the termination of the general rule-making proceeding.

2. O'Neill's prior Petition for Rule-Making for the reassignment of VHF Channel 12 had been denied by the Commission by report and order adopted and released November 10, 1955, without hearing or other process and without further proceedings and without consideration of its merits. That petition sought to change the television channel assignments at Fresno, California, so as to make the commercial assignments to that city all UHF by deleting Channel 12 as a commercial assignment and substituting Channel 18 instead, making Channel 12 available for educational non-commercial purposes in lieu of the reserved Channel 18. A stay of the VHF proceedings pending the determination of this petition was also requested. The Commission in its Memorandum Opinion and Order, and Decision, of January 12, 1956, did not pass on the merits of the petition for rule-making. A Petition for Review of the Order of November 10, 1955, denying the prior Petition for Rule-Making referred to, was filed in this Court pursuant to Section 402 (a) of the Communications Act of January 9, 1956. At the time of the release of the Memorandum Opinion and Order which is the subject of this petition for review, the Commission also released a decision granting VHF Channel 12 to one of two competing applicants. An appeal from this decision is being filed in this Court simultaneously herewith and in accordance with Section 402 (b) of the Communications Act.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Feb. 10, 1956]

O'NEILL BROADCASTING CO.,	)	
Appellant,	)	
v.	)	Case No. 13,164
FEDERAL COMMUNICATIONS COMMISSION,	)	
Appellee.	)	

NOTICE OF APPEAL AND STATEMENT OF
REASONS THEREFOR

1. Appeal is taken pursuant to Section 402 (b) of the Communications Act of 1934, as amended (47 U.S.C. 402 (b)) by the O'Neill Broadcasting Co., a corporation organized and doing business under the laws of the State of California with its principal office and place of business at Fresno, California, where it operates UHF television Station KJEO. Appellant will hereinafter be referred to as "O'Neill."

2. Appellant is aggrieved and its interests are adversely affected by a Memorandum Opinion and Order and Decision of the Federal Communications Commission, released January 12, 1956, which

(a) granted by final action the application of the California Inland Broadcasting Company for a new VHF commercial television station to operate on Channel 12 at Fresno, California. The grant, as appears from the face of the decision and the concurring and dissenting opinions, was made not on a determination of the comparative merits of the two applicants to serve the public interest as required by law, but for the purposes of avoiding a voting impasse on the part of the members of the Commission and to bring a "needed and vital service" to Fresno "without further lengthy delay" - issues upon which appellant was wrongfully precluded from being heard. Said grant is on its face an invalid authorization for a construction permit for failure of a majority of the Commission to agree on the superior qualifications to serve the public interest of one of the two competing applicants.

(b) dismissed as moot a petition of O'Neill to hold in abeyance

the above final action until such time as certain other matters pending before the Commission which may have required inconsistent action were determined, and until after final determination of all matters pending before the Commission involving the reassignment of VHF Channel 12 so that no adverse action would be effected outside of the proceedings on O'Neill's then pending petition to reassign Channel 12; and

(c) denied O'Neill's petition for alternative relief which requested that the Commission either (i) consolidate the proceedings concerning VHF Channel 12 with the general rule-making proceedings initiated by the Commission concerning the reallocation of television channels, or (ii) to permit O'Neill to intervene in the VHF Channel 12 proceedings with a remand for further hearing therein on certain specified issues as to whether a grant of the VHF channel at that time would be in the public interest, or (iii) hold in abeyance final determination in the VHF Channel 12 proceedings until a disposition of the general rule-making proceedings, or (iiii) in the event the foregoing petitions were denied, that the Commission make the final grant subject to a later assignment of the specific channel to be utilized, such channel assignment to be made after the completion of general rule-making proceedings, or that the grant of the construction permit carry the condition that no construction be commenced until after the termination of the general rule-making proceeding.

* * * * *

EXHIBIT A-1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Application of	)	
GULF COAST BROADCASTING COMPANY	)	DOCKET NO. 10559
Corpus Christi, Texas	)	FILE NO. BPCT-723
For Construction Permit for New	)	
Television Broadcast Station	)	

MEMORANDUM OPINION AND ORDER AND DECISION

By the Commission: Commissioners Hyde and Bartley dissenting and
issuing a statement.

* * * * *

6. The Commission, as stated, on November 10, 1955, denied sundry individual petitions for ad hoc amendments to one of its important television rules, the Sixth Report and Order adopted on April 11, 1952. As to certain of said petitions the Commission had previously instituted individual rule-making proceedings, permitted the filing of comments and the making of oral arguments before the Commission. Subsequently, as has been stated, these petitions together with others enumerated in such memorandum opinion and order and report and order were disposed of on the basis that, the problem being one of national significance, a general rule-making proceeding with reference to the aforesaid Sixth Report and Order should be instituted, in lieu of considering the making of ad hoc amendments thereto. On November 10, 1955, such a general rule-making proceeding was instituted. As has also been stated, Coastal Bend Television Company may participate fully therein. Such disposition was the result of exercise of informed discretion by the Commission. It is thus clear that the Commission's action of November 10, 1955, denying Coastal Bend Television Company's Petition for Rule Making disposed of this pleading insofar as it requested special consideration of the television allocations made to the city of Corpus Christi, Texas. Such consideration was requested separate and apart from overall consideration of the allocation plan and without

regard to the effect the requested relief would have on allocations to other communities. While Coastal Bend Television Company may again urge the same matters in the General Rule Making Proceeding they will there be considered on an overall basis rather than on a basis of special consideration to allocations to the city of Corpus Christi. Therefore, its petition filed herein on March 11, 1955, being founded on a Petition for Rule Making, which has been denied, must be dismissed as moot.

7. We turn now to the requests for intervention in and stay of the hearing proceeding on the application of Gulf Coast Television Company.^{1/} The basis therefor is essentially the same as that urged by the petitioner when it requested amendment of the Commission's Sixth Report and Order in order that petitioner might be free of VHF competition. Thus, the reasons here advanced were considered at the time of the memorandum opinion and order adopted on November 10, 1955, which denied the rule making requested. Nonetheless, and notwithstanding the Commission's statement, in its action of November 10, that the broader national considerations must be first developed in a general rule making proceeding (instituted also by a notice of proposed rule making of November 10, 1955), this petitioner has filed essentially the same pleas and arguments in a form addressed to this adjudicative proceeding pressing the same arguments. The Commission has considered these arguments. (Memorandum Opinion and Order of November 10, 1955). It has denied them pending the outcome of general rule making. Ibid. It deferred for individual treatment certain stay requests concurrently made: (1) because

^{1/} Our disposition herein makes it unnecessary to consider the threshold question whether, as a matter of right, the petitioner is a party in interest entitled to intervene in the adjudicatory proceeding. We also find it unnecessary to consider the related question whether, if petitioner is not so allowed to intervene, it has any right to participate at all in the proceeding for the purpose of seeking other relief, to wit, whether, if petitioner asserted an interest on which intervention (if duly requested) could be based, the failure to establish such interest would deny the petitioner, as a stranger to the proceeding, the right to request "other relief."

it determined that a general freeze upon the decision of comparative television proceedings in adjudicative process is not in the public interest; and (2) because the granting of individual requests for the stay of adjudicative proceedings, outside the record of such proceedings, would be improper.

8. In now considering the requests for intervention in and stay of the instant proceeding, two primary matters are involved. The Coastal Bend Television Company application resulting in a grant authorizing construction of station KVDO-TV was filed on July 24, 1952. It was granted on January 6, 1954 with Special Temporary Authorization for operation being given on May 7, 1954. The station commenced actual operation on August 2, 1954, and presently has pending an application for original license. The application of Gulf Coast Television Company was filed on June 1, 1951, and was designated for hearing by Commission Order released on June 29, 1953. Hearing was held and on June 18, 1954, the Examiner released his Initial Decision looking toward grant of the application of Gulf Coast Broadcasting Company. Thus Coastal Bend filed and prosecuted its application with full knowledge of the pendency of the Gulf Coast application and with full knowledge of the hearing proceeding thereon. It at no point was previously sought to intervene in this proceeding and intervention at this late date with the consequent disruption of the adjudicatory proceeding relative to Channel 6 cannot be permitted even if it be assumed that there is merit to petitioner's contentions. A second consideration is that petitioner has set forth no matters showing, in conformance with the requirements of Section 1.388 (b) of the Commission's Rules, how its participation will assist the Commission in the determination of the issues in the hearing proceeding. None of the issues in any manner contemplates interposing into this adjudicatory proceeding Rule Making matters or economic injury to existing broadcast services. These are the matters asserted by petitioner. Further, we believe the Rule Making matters which are of general applicability, are improper for consideration in this adjudicatory proceeding. Relative to the alleged injury

to petitioner, Coastal Bend Television Company, at the time of prosecution of its application, was well aware of the fact that it would face competition from other television stations in the area. It secured its grant prior to the other applicants for television facilities in the city of Corpus Christi, and for well over a year has been the only station providing local television service. It now seeks to maintain this position by attempting to interject into this proceeding rule making matters and questions of economic injury to itself through the assertion that a grant will result in injury to the public. If intervention is permitted, it further requests a stay in the proceeding. If intervention is refused, it requests in the alternative that the effectiveness of any grant made be stayed pending final determination of the General Rule Making Proceeding in Docket No. 11532. This request is founded on the premise that if not granted it will affect the determinations to be made in Docket No. 11532.

9. We are unable to discern any prejudicial effect immediate grant of the application of Gulf Coast Broadcasting Company could have on the General Rule Making Proceeding in Docket No. 11532. The issuance of a construction permit to Gulf Coast Broadcasting Company cannot operate to negate the Commission's rule-making power should it subsequently be determined that it is in the public interest to order any station constructed to operate on a channel other than Channel 6. This is equally true with respect to Coastal Bend Television Company should it subsequently be determined as a result of the said General Rule Making Proceeding that it is in the public interest to order that station KVDO-TV operate on a channel other than that presently assigned to it. Such authority is specifically conferred upon the Commission by Section 303(f) of the Communications Act of 1934, as amended. Thus, while petitioner has here based its requests for relief on suppositious eventualities in the said rule making proceeding, should such eventualities be realized a grant at this time of the application of Gulf Coast Broadcasting Company would in no way preclude effectuation of the determinations made. The sole effect of granting either of petitioner's requests for relief would be to further delay the bringing of an additional television service to the

citizens of Corpus Christi. This we consider not to be in the public interest. Under the foregoing considerations, the request for intervention in and the requests for stay must be denied.

* * * * *

EXHIBIT B-1

Docket Nos. 9050 and 10650

Dissenting Opinion of Commissioners Hyde and Bartley

We dissent to the decision entered in Docket No. 9050 and 10650 as being prejudicial to the consideration of the issues in Docket No. 11532, and legally unsound.

The factual situation in this instance is similar to that of the Madison cases (Dockets 8959 and 10641) and the reasons we stated for dissenting in that matter apply in principle in this proceeding.

The action approved by the majority would introduce a VHF operation in what is now a UHF only market. Two UHF stations are now serving the market and a third is authorized. Only one VHF operation is possible under the allocation of station assignments. The one VHF operation according to allegations before the Commission would have a potential of becoming a monopoly. There are also allegations that continued licensing of VHF stations in such situations will make impossible the development of a comprehensive competitive television service. However, any consideration of these questions and possible corrective measures has been assigned to a different proceeding which is now being conducted by the Commission.

We are concerned that the action in this and similar cases in which grants are made in disregard for the rule-making proceeding and without determination of relevant public interest issues will not only prejudice efforts to improve the allocation structure but cause needless hardship and delay.

DISSENTING OPINION OF COMMISSIONERS HYDE AND
BARTLEY

In Docket 8959 and 10641 referred to in preceding dissent.

We dissent to the untimely and ill-advised action of the majority in Dockets 8959 and 10641. The action approved by the majority would authorize construction of a VHF-TV broadcast station in what is now a UHF market with 3 such stations in operation. Only one VHF station is possible under the allocation of station assignments. The grant carries with it approval of expenditures in the amount of \$598,340.26.

Recently, on November 10, 1955, the Commission in its Notice of Proposed Rule Making, Docket No. 11532, recognized that "difficulties encountered in achieving successful operation of stations in the UHF band have been a significant factor" in our admitted failure fully to realize the objectives of the Sixth Report and Order. In the same Notice the Commission assured all concerned that "to the extent that any of the present difficulties may be alleviated by possible revision of the present allocation system, such possibilities will be fully explored." It is obvious that deintermixture in Madison, as in other localities, is one of the "possibilities."

Yet in complete disregard for the rule-making proceeding, a grant is made which will complicate and hinder proper consideration of proposals which the Commission has stated would be fully explored. The argument may be made that the grant of a permit for construction of a station to operate on Channel 3 does not, as a matter of law, preclude the Commission from modifying the permits to specify some other channel in accordance with the requirements of the rule-making proceeding. The implications of this are that the Commission could first find that a grant on Channel 13 is in the public interest and then on completion of rule-making, which is now in process, find that a grant on Channel 3 is not in the public interest. If this method of doing business is not arbitrary and capricious, the result might satisfy legal theory. The difficulties inherent in such judgment gymnastics are made more

apparent if consideration is given to the factual situation. It is manifest that any modification from Channel 3 to the UHF would involve a substantial loss of funds by the grantee. There would also be inconveniences and losses imposed upon the public. The Commission has been most loath in the past to disturb existing operations or equities. Such matters would be relevant considerations in determining whether an order of modification would be in the public interest. The expense of a hearing has been cited as a ground for not making an allocation change. See Memorandum Opinion and Order released November 1, 1955 (Mimeo No. FCC 54-1355, 12068). The drastic procedure of ordering a modification of permit or license has been used only in the most compelling circumstances.

The understandable reluctance to disregard an existing situation is recognized in the Act. In the formulation of the Radio Act of 1927 and the Communications Act of 1934, Congress recognized that expenditures in the construction of radio facilities would place heavy and undesirable pressures upon the Commission to protect such expenditures. For the purpose of eliminating such pressures Congress adopted a provision (Section 319) which flatly prohibits the licensing of stations constructed without prior authorization from the Commission. The action approved by the majority heedlessly and needlessly creates for the Commission the very kind of obstacle which Congress sought to avoid.

The action taken today is in the face of the strongest of representations by two UHF licensees in Madison that such a grant would force them to cease operation with consequent inescapable economic injury; that it would result in a diminution rather than an addition to the TV service in Madison; that it would result in the eventual cessation of the operations of the publicly-owned and supported educational UHF station in Madison; and that such a grant could well prove a catalyst that would set off the spiral which could result in the abandonment of UHF service throughout the country.

This is not to suggest that the Commission accept all or any of these allegations at face value. But the Commission should provide a

real forum where the evidence in support of and in opposition to these contentions may be presented. Due process, as well as a proper respect for the principles of the Administrative Procedure Act and the Communications Act, would require a realistic appraisal of all relevant facts and a determination of their effect upon the public interest prior to a decision of such far-reaching consequences.

Thus far the Commission has decided in the Madison deintermixture proceeding that such proceeding is not the proper forum for the determination of issues presented by the deintermixture petitions. No decision was reached upon the merits because the problems were "nation-wide" in scope (FCC 55-1125). The Commission by majority vote has decided today that because of the nature of these adjudicatory proceedings this, too, is not the proper forum to consider deintermixture. The Commission has decided that the pending rule-making proceeding is the forum where proposals and petitions concerning deintermixture should be heard. However, at the same time, it recognizes the rule-making proceeding as the proper forum, the Commission is deciding, as a practical matter, the very issues it proposes to consider in the future. This type of procedural double talk is akin to the procedures invalidated by the Supreme Court in *Ashbacker vs. U.S.*

In view of the foregoing we are of the opinion that the Commission cannot on the present record make a valid finding that the granting of a permit and construction of a station as proposed in either of the applications under consideration would serve the public interest, convenience and necessity. Since the majority of the Commission insist upon a determination of the applications at this time, we are obliged to vote to deny both.

EXHIBIT C-1**DISSENTING OPINION OF COMMISSIONER ROSEL H.
HYDE**

(in Docket Nos. 11,238, et al.)

I dissent to the Report and Order entered by the majority in Docket Nos. 11238, 11333, 11334, 11335 and 11336, dated November 10, 1955, and to the Memorandum Opinion and Order of the same date, denying some 26 petitions for rule-making to amend Part 3 of the Commission's regulations. I consider the actions of the majority of the Commission to be premature, ill-advised and wholly inconsistent with the Commission's other actions in this area.

The Commission is under a statutory mandate to provide a nationwide competitive television service. Until it has been shown that this can be achieved with the 12 present VHF channels (or that additional VHF channels are available with which to achieve such result), I deem it imperative to preserve the UHF service. What the Commission has done today may deal a death blow to UHF television service.

The Orders which have been entered in these cases would dispose of a large number of individual petitions addressed to specific situations, by blanket declarations to the effect that action on individual petitions would not resolve the overall problem. This offers strange reasoning and an abrupt change in procedure much belated in its application.

Until this moment, it has been the practice of the Commission to consider petitions for changes in rules establishing the TV allocation upon an individual basis. Many such petitions have been acted upon in individual rule-making proceedings. A large number of such petitions have been granted, including petitions for shifts in TV station assignments, changes in zones, reservation of channels for educational purposes, and the addition of new station assignments. Five of the petitions disposed of today have been subjects of notices of proposed rule-making issued in March of this year. Comment was invited from interested persons, and the Commission requested that participants direct their attention and submit data with reference to a number of particular matters.

Oral Argument in the five cases was heard before the Commission on June 27 and 28, 1955. The rule-making notices, the requests for specific information and the issues discussed in the argument contemplated consideration of the cases on their individual merits. The summary disposition of these cases today on what is essentially a new procedure device seems certain to raise grave questions as to the meaning of the earlier proceedings.

While the orders are virtually bereft of specific findings to support the conclusions, it is manifest that material, both in and de hors the record, has been considered in reaching such conclusions. The unfortunate result of this method of disposing of the various proposals is that no real consideration is given to the merits of any of them. Moreover, to the extent that information outside of the record played a part in the majority decision, the participants in the formal proceedings have not had a fair opportunity to be apprised of the existence of such material, let alone meet or test the validity thereof. To give the semblance of due process, the majority proposes a general rule-making proceeding in which all of the various problems can be lumped together and considered, and in which proceeding all pertinent information can be spread upon a public record before a final determination is reached.

The procedures which have been invoked at this time can only be interpreted as putting the petitions (and the formal proceedings heretofore held on a number of them) out of the way, although obviously, such procedure is not at all necessary to the general rule-making proceeding proposed.

But the obvious reason for the sudden haste of the majority in taking the present action is to clear the decks for the immediate grant of VHF applications in a number of communities involved in the deintermixture cases, and in other communities in which deintermixture has been suggested and peremptorily turned down. The deintermixture petitions which have been turned down request stays in the pending VHF proceedings. Therefore, these requests for stays are here being denied without proper findings or without proper consideration of the material submitted

in their support. But if the evidence which has been adduced by the petitioners (and not considered by the majority) has merit, the grant of these VHF applications may well have the effect of denying the very relief sought by the proponents of deintermixture prior to the determination of the general rule-making proceedings. Without passing upon the contentions made by the various petitioners, and without evaluating the evidence that has been adduced upon the record, the Commission may, in granting the VHF applications, effectively eliminate many UHF stations which are presently in operation and in many instances render the cases moot. Thus, we have a situation not too dissimilar from that presented in the Ashbacker case whereby the Commission, by making a grant to one applicant before it is effectively denying relief to another party, and without giving that party its day in court. The actions of the Commission in making further VHF grants in these areas can but have the effect of seriously hampering and perhaps of unalterably precluding the Commission from giving proper and adequate consideration to the overall study of the allocation plan.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T.
BARTLEY

I believe these petitions should be disposed of separately upon their individual merits, thereby serving as a pattern for the expeditious disposition of the remaining deintermixture petitions. Such action would afford stability and guidance to the television service. Such action would clear the way for continued processing of applications and would provide permit holders with the necessary confidence that their status would not be changed in the immediate future. The uncertainty created by the action of the majority is not conducive to encouraging the assumption of the substantial risks involved in getting additional service on the air.

With respect to the Vail Mills "slug-in" I cannot agree with the conclusion reached by the majority on the merits of the petition. In my judgment, the result will be the death knell of multiple UHF services in the area; consequently, less instead of more service to the public.

COMMISSIONER WEBSTER CONCURRING IN PART AND
DISSENTING IN PART

When consideration was first given to these deintermixture cases, I was of the opinion that, deplorable as may be the delay already occasioned by unforeseen developments relating to these petitions, action thereon at this time, in the face of the Commission's notice of proposed rule-making for the purpose of reviewing the nation-wide television allocation plan, appeared both inappropriate and inconsistent. It seemed to me that the further delay which would result from the Commission withholding action on these petitions until a decision in the general proceeding had been reached would be warranted in view of the cloud which the decision in these cases might place upon the larger proceeding.

However, in view of the fact that the Commission's report and order as now written provides that its denial of the deintermixture petitions is without prejudice to any action the Commission may take as a result of the general rule-making proceeding in which the petitioners in these deintermixture proceedings will be given the opportunity to participate, it would appear to me that the majority's views are sufficiently similar to mine to enable me to concur with its report and order insofar as it concerns the deintermixture cases.

R. 3546

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

[Rec'd Oct. 17, 1955, F. C. C. Mail & Files]

Applications of	)	
CALIFORNIA INLAND BROADCASTING CO.	)	Docket No. 9050
Fresno, California	)	File No. BPCT-413
KARM, THE GEORGE HARM STATION	)	Docket No. 10650
Fresno, California	)	File No. BPCT-1061
For Construction Permits for New	)	
Television Stations (Channel 12)	)	

PETITION OF O'NEILL BROADCASTING CO.

O'Neill Broadcasting Co., by and through its attorney, files this petition in the above proceeding to hold in abeyance the final action therein until such time as certain other matters now pending before the Commission which may require inconsistent action are determined.

Petitioner, in the support of this petition, respectfully states as follows:

1. The above entitled proceedings involve mutually exclusive applications for authority to construct a commercial television station to operate on VHF Channel 12 at Fresno, California. A comparative hearing has been held on the above applications and an initial decision by the Hearing Examiner has been released. Exceptions to said initial decision have been filed, oral argument had before the Commission, and the matter is now waiting a decision and final determination by the Commission.

2. Petitioner is a party in interest in the above proceedings by reason of the following:

(a) That petitioner is the holder of authority for construction and operation of commercial television station KJEO, operating on UHF Channel 47 at Fresno, California. Said station has been in actual operation for more than two years. There is an additional commercial television station KMJ-TV at Fresno operating on UHF Channel 24, and an

R. 3547 additional outstanding station construction permit on UHF Channel 53, not presently in operation.

(b) The UHF stations will be in economic and commercial competition with the successful applicant in the above entitled proceeding.

(c) Petitioner has on file before the Federal Communications Commission a "deintermixture" petition to amend the rules concerning television broadcast channel assignments at Fresno, California, so as to change the remaining VHF assignment available on Channel 12 to UHF Channel 18, and to make available Channel 12 for non-commercial, educational television operation in lieu of the presently assigned Channel 18 to the end that Fresno will remain an all UHF commercial community. (A copy of said petition is attached hereto as Exhibit A, and made a part of this petition by reference.) Oppositions to said petition have been filed by both of the applicants in the above-entitled proceeding and the matter is now pending before the Federal Communications Commission, said matter not yet having been designated for rule-making proceedings.

(d) That in addition to the above described petition for deintermixture, the operators of commercial television station KBAK-TV, operating on UHF Channel 29 at Bakersfield, California, have on file before the Federal Communications Commission a petition to amend the rules to assign Channel 12 from Fresno to that community to the end that Bakersfield, California, may become an all VHF community. No action has yet been taken on said petition and that matter is now pending.

(e) In March, 1955, prior to the filing of petitioner's petition to amend the rules for deintermixture at Fresno, California, the Commission initiated proposed rule-making proceedings pursuant to previous petitions before it for deintermixture in Dockets No. 11238, 11333, 11334, 11335, and 11336 involving deintermixture considerations in other localities. Said rule-making proceeding sought to secure information concerning deintermixture in those specified areas. Oral argument on said petitions was had on June 27, 1955, and June 28, 1955, and the matter is still pending before the Commission.

(f) Any action granting a construction permit on VHF Channel 12 at Fresno to either of the two applicants would constitute adverse

action by the Commission on Petitioner's petition for deintermixture and on the petition of KBAK-TV for assignment of Channel 12 at Bakersfield, California, if made before completion of the proceedings involved in said petitions and before a final determination thereon, and will irreparably prejudice petitioner. The pending petitions for deintermixture and reassignment of channels will be thereby rendered moot and ineffective.

* * * * *

R. 3565

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

[Rec'd Nov. 30, 1955, F. C. C. Mail & Files]

In re Applications of

CALIFORNIA INLAND BROADCASTING CO.	)	Docket No. 9050
Fresno, California	)	File No. BPCT-413
KARM, THE GEORGE HARM STATION	)	Docket No. 10650
Fresno, California	)	File No. BPCT-1061
For Construction Permits for New	)	
Television Stations (Channel 12)	)	

PETITION OF O'NEILL BROADCASTING CO. FOR
CONSOLIDATION, INTERVENTION, AND OTHER RELIEF

O'Neill Broadcasting Co., by and through its attorney, files this Petition in the above proceedings for alternative relief as set forth below. Petitioner requests that the Commission either

(a) Consolidate the above proceedings with Docket No. 11532, or

(b) Permit Petitioner to intervene in the above proceedings with a remand for further hearing therein, or

(c) Hold in abeyance final determination in the above proceedings until a disposition of the rule-making proceedings in Docket 11532, or

(d) In the event that the foregoing petitions are denied, that the Commission either make the final decision and grant in the above proceedings subject to a later assignment of the specific channel to be utilized, such channel assignment to be made after completion of proceedings in Docket 11532, or that the grant of the construction permit carry the condition that no construction be commenced until after the termination of proceedings in Docket No. 11532.

Petitioner, in support of this petition, respectfully states as follows:

1. Petitioner is the holder of authority for construction and operation of commercial television station KJEO on UHF Channel 47 at Fresno, California; that said station has been in actual operation for more than two years; that there is an additional commercial television station at Fresno (KMJ-TV), operating on UHF Channel 24, and an additional outstanding station construction permit on UHF Channel 53, not presently in operation. There is a reservation for an educational television station on UHF Channel 18 for which no application has been made. The nearest community with a television station is Tulare, California, approximately 45 miles from Fresno. The station operates on UHF Channel 27.

2. The above entitled proceedings involve mutually exclusive applications for authority to construct a commercial television station to operate on VHF Channel 12 at Fresno, California. A comparative hearing has been held on the above applications and an initial decision by the hearing examiner has been released. Exceptions to said initial decision have been filed, oral argument had before the Commission, and the matter is now waiting a decision and final action by the Commission.

3. The existing UHF Stations in Fresno, including petitioner's, will be in economic and commercial competition with the successful applicant in the above entitled proceedings.

4. The grant of a construction permit to operate on VHF Channel 12 in Fresno to the successful applicant in the above entitled proceedings will result in serious injury to the public and in severe economic injury to petitioner.

5. On April 7, 1955, petitioner filed with this Commission a "deintermixture" petition to amend the rules concerning television broadcast channel assignments at Fresno, California, so as to make available UHF Channel 18 for commercial television operation in lieu of the assigned VHF Channel 12, and to make the VHF Channel 12 available for non-commercial educational television use in lieu of UHF Channel 18, to the end that Fresno would continue as a commercial TV community all UHF in operation. Oppositions to said petitions were filed by both of the applicants in the above entitled proceedings.

6. On May 13, 1955 the Bakersfield Broadcasting Company, operators of television station KBAK-TV on UHF Channel 29 at Bakersfield, California, also filed a petition to delete Channel 12 from Fresno and to assign it to Bakersfield, so that Bakersfield might become an all VHF community, the city already having an operating station on VHF Channel 10.

7. There has been filed with the Commission some thirty petitions involving reallocation proceedings in various communities throughout the United States, of which approximately fifteen seek deintermixture proceedings similar to petitioner's petition. Some of these petitions
R. 3567 were set by the Commission for formal rule-making proceedings (see Dockets 11238, 11333, 11334, 11335 and 11336) in which comments, supporting data and information were filed and on which oral argument was had by the Commission sitting en banc.

8. On November 10, 1955 the Commission denied all of the rule-making petitions described above, those, including petitioner's, which had not been designated for formal rule-making proceedings and upon which oral argument had not been heard, as well as those which had been the subject of the formal proceedings and upon which the Commission heard argument. The basis for the denial of all the petitions was that the Commission had at the same time instituted a general rule-making proceeding in an endeavor to solve reallocation problems on a national scale instead of endeavoring to determine the matter on a case-by-case or piecemeal basis. The denial contained at least an implied

invitation to all of the petitioners to proceed in the general proceedings.

9. The denial of petitioner's petition for deintermixture does not purport to be on the merits, but was made only so that the matters presented might be considered by the Commission on a broader scope in the general rule-making proceedings. Petitioner, within the time allotted, will participate in such proceedings and seek relief therein.

10. Petitioner's former petition for deintermixture contained a request that final decision in the docketed VHF Channel 12 proceedings be made subject to the outcome of the proceedings in the deintermixture proceeding. Consequently, the denial of that petition leaves petitioner without a pleading before the Commission, seeking both the deintermixture relief, and abeyance action in the docketed VHF Channel 12 proceedings, until such deintermixture matters are determined.

11. Heretofore, on October 18, 1955, petitioner filed in the above entitled VHF proceedings a petition to hold in abeyance the final action in the proceedings, until such time as matters involving reallocation of Channel 12, which might require inconsistent action, were determined. This was done so that no adverse action would be imposed on the deintermixture proceedings by reason of final action in the above entitled proceedings. It is not clear from the orders of the Commission issued November 10, 1955, whether the Commission intended also to deny this petition because of its dependence upon the petition for deintermixture, R. 3568 included in the Commission's denial. In any event, this petition will supersede or supplement the former petition on file herein.

12. Petitioner does not seek intervention in relation to the issues of comparative qualifications of the applicants in the above entitled VHF proceedings, and petitioner takes no position as to which of the two applicants should be preferred for the authorization. Petitioner's interest lies only in the fact that action in the above entitled VHF proceedings is so entwined and related to the relief which petitioner has sought in his former deintermixture proceeding and to the relief which can be granted in the now pending general rule-making proceeding, that action by the Commission in the above proceeding authorizing construction and

operation of VHF Channel 12 in Fresno, in the light of the existing circumstances would be tantamount to an adverse decision in the rule-making proceedings, and would preclude and render ineffectual any relief that may be forthcoming in the rule-making proceeding.

13. Action in the above proceedings will be determinative of petitioner's request for relief by way of reallocation of Channel 12. The ultimate question in the rule-making proceeding stated in the simplest form is whether the Commission should make an additional grant in Fresno on Channel 12 or should make it on some other channel. A grant of Channel 12, therefore, in the above docketed proceedings, would constitute action in the general rule-making proceeding. This situation requires the Commission to either consolidate the above entitled proceeding with the general rule-making proceedings, so that the two applicants in the above proceedings may participate on the question of reallocation of the channel, or to permit petitioner to intervene in the VHF proceedings so that it may make a full and complete showing of the impact of the Commission action in making an authorization for operation on a VHF channel at Fresno.

14. Petitioner, by way of a showing of good cause for filing this petition at this time, states:

(a) That the injury to the public interest and to petitioner constituting the basis for petitioner's intervention in these proceedings and request for consolidation did not become clearly apparent until the Fall of 1954. That at that time, the Commission had apparently adopted the policy of denying petitions for rule-making proceedings in deintermixture cases, and it was not until on or about March 31, 1955, that on further consideration, the Commission recognized the problems and the possible relief by way of deintermixture, and indicated, in its notice of proposed rule-making, serious concern with such problems. Thereafter, on April 7, 1955, petitioner filed its petition for deintermixture, as outlined above. Petitioner took the position that final action in the VHF Channel 12 proceedings would not be taken by the Commission until after action was taken upon petitioner's deintermixture petition, and in

this connection, it relied upon statements made by Commission members to the United States Senate Committee on Interstate and Foreign Commerce in pronouncing the policy of the Commission to be such that the Commission would hold up the grants in those cases in which deintermixture petitions had been filed. (See transcript of hearings before United States Senate Committee of Interstate and Foreign Commerce. S. 1648, July 7, 1955, (84th Cong.), pp. 43-44).

(b) As a result of the petition then on file with the Commission and the pronouncement of Commission policy, as stated to a United States Senate Committee, it did not appear necessary for petitioner to ask for intervention or consolidation of these proceedings in order to assure that the inter-related matters would be considered together. It was not until the Commission's order of November 10, 1955, from which some question arises as to whether the commission has changed its policy and will no longer hold the inconsistent grants in abeyance that it became necessary for petitioner to seek intervention or consolidation in order to present to the Commission the nature of the injury to the public and to petitioner, which would result from a final disposition in the VHF Channel 12 proceedings prior to a final termination of the rule-making proceedings.

15. The issues and matters upon which petitioner will seek determination and consideration, if its petition for intervention or consolidation is granted, are as follows:

(a) The effect on the public interest of a grant of a construction permit on a VHF channel in Fresno at the present time in light of all of the existing circumstances, and particularly whether such a grant will ultimately result in greater or less television service to Fresno and its surrounding area.

(b) The effect on the public interest of a grant of a construction permit on a VHF channel in Fresno at the present time, in the light R. 3570 of the pending rule-making proceedings in docket No. 11532 and the orderly implementation of the final determination in that proceeding.

(c) The effect on the establishment of a nation-wide

television service utilizing UHF channels of making a VHF grant at Fresno, California at the present time, in the light of existing circumstances.

(d) The nature and effect of a grant of a construction permit of a VHF channel on the existing UHF television stations in Fresno, and particularly whether one or more UHF television stations in Fresno can survive in the face of the competition of a VHF television station, and the nature and effect of this competitive impact on television service to the public.

(e) The effect of the destruction of UHF television service in Fresno, if that should be the case, upon (i) the establishment of a nationwide television service utilizing UHF channels and the effect upon manufacturers of equipment and owners of UHF receivers and (ii) the effect on the orderly implementation of the ultimate determinations in the general rule-making proceeding.

(f) The nature and the effect, if any, on the investment of the public in UHF television receivers in the Fresno area by reason of the grant of a VHF television station at the present time.

(g) Whether the public interest, in view of the present situation of television broadcasting and its economics would be served by a grant of a VHF station in a community presently served by two UHF stations and having an additional non-operating UHF station and an educational UHF reservation.

(h) Information concerning the service contours of the UHF stations presently operating in Fresno, as well as the proposed service contours of the VHF applicants for Channel 12.

(i) The estimated number of families or persons in Fresno and the surrounding area residing within the service contours of both operating and potential television stations in Fresno, together with information concerning the number of families or persons residing both within and without the conventional service contours of the operating and potential television stations and who receive a satisfactory signal.

(j) The estimated total number of television receivers in

Fresno and the surrounding area, including the percentage of sets capable of receiving UHF transmissions, with specification as to the number of sets within the various service contours and the number of sets beyond the service contours that receive satisfactory transmissions from Fresno.

(k) Information as to the number of outside VHF or UHF services, if any, that are received in Fresno and the surrounding area, or that may be expected to be received in Fresno and the surrounding area, in accordance with the present assignment table, together with information as to the nature and quality of the signal received.

(l) Information as to the nature and extent of any areas and populations in and surrounding Fresno, if any, which would lose potential commercial television service in the event Channel 12 is reserved for educational use in Fresno or is deleted from that community, together with information as to what other services are received in such areas and to what extent such other services may be expected to be received under the present assignment table.

(m) Information relative to the utilization of Channel 12 in another community, in accordance with the Commission's rules and regulations if it is deleted from Fresno, and the nature and extent of the impact of such assignment on the other community.

(n) Information concerning the nature and extent of areas and populations to be served by a grant of VHF Channel 12, which do not receive service from the existing UHF channels, and particularly whether such areas and populations receive service from television stations in other communities, and the extent to which such persons and areas are related to the market and trading areas of such other communities.

(o) Information with respect to television network relations in Fresno, including complete information as to present and proposed network affiliations; the extent of network programs currently received in Fresno on a regular basis; the terms of existing network contracts, including cancellation provisions and commitments; the prospect of UHF stations for continued network affiliation after authorization of a

VHF station; prospective network affiliations in the event three commercial UHF and no commercial VHF stations are authorized in Fresno; the availability of program material and advertisers' support for UHF stations in Fresno in the absence of network programs; and information indicating the impact on future sales of UHF equipped receivers in the event

R. 3572 UHF stations curtail transmission of network programs.

(p) The nature and effect of the attitude of network and national and regional advertisers on the placement of advertising on UHF stations where a VHF station comes into operation in the community and is affiliated with a major network, together with information concerning the existing attitude, policies and philosophy of advertising agencies with reference to utilization of a UHF station where it is operating in competition with a VHF station in the same market, and the effect upon the revenue and continued operation of the UHF stations; and the ultimate effect upon the public interest.

(q) The nature and effect of construction and operation of a VHF station by an educational group, as opposed to the construction and operation of a UHF station in the light of initial cost of installation and of costs of operation thereafter.

16. The pertinence and importance of the questions and matters raised above are demonstrated by the following, which petitioner represents as the factual situation relative to television operation at Fresno, California:

(a) Fresno is presently an all UHF community with two operating and one non-operating UHF stations. Only one VHF channel 12, is assigned to Fresno. An educational station reservation is held on Channel 18.

(b) There is no VHF service in Fresno from either local or outside stations, and there will be no commercial VHF service if Channel 12 is reassigned.

(c) Fresno received its first television service as a UHF service and there is, consequently, no problem of conversion.

(d) There are at present approximately 175,000 UHF receivers, which are predominantly all channel UHF-VHF receivers as distinguished from converted VHF sets.

(e) Station KJEO transmits from a site approximately 4300 feet above the level of the community it serves with an effective radiated power of 427 kw.

(f) All of the Fresno trading and market area, including all of the Fresno metropolitan area and considerable additional territory, R. 3573 receives excellent technical service. The signal of KJEO is satisfactorily received at distances of more than 90 miles from Fresno.

(g) There will be no "white" areas in the service at Fresno for the reason that any VHF coverage which might be greater than that of UHF will be in either rugged, sparsely populated, mountainous areas or in areas of population which receive better service from other stations more closely located to them. All of such "excess" coverage from the VHF station would be in other market and trading areas with their own television stations.

(h) All of the television networks are served by the two UHF stations in Fresno and said stations are operating on a successful commercial basis, but that such position has been achieved only after periods of substantial loss in building a UHF community.

(i) The applicants for Channel 12 will not be harmed or prejudiced by the substitution of Channel 18, the most desirable UHF channel in Fresno, or some other UHF channel, and will receive the full benefit of the efforts and expenditures of the existing UHF stations in creating and building a substantial all UHF audience.

(j) The assignment of Channel 12 for educational television will effect a substantial saving in construction and operating costs for the educational broadcasters without any loss in service, and will thus make possible the establishment and maintenance at much lower cost of the non-revenue producing educational television station than would otherwise be the case.

(k) The assignment of Channel 12 to Bakersfield, California, will permit both operating stations there to operate on VHF channels and will convert that community to an all VHF city -- thus creating deintermixture in that city.

(l) Station KJEO commenced operation as an ABC network affiliate. It now is also affiliated with the CBS television network. The station's affiliation agreement, however, with the CBS television network is subject to ninety (90) day cancellation.

(m) One of the applicants in the VHF Channel 12 proceedings had, by reason of an historical radio affiliation with CBS, a long-standing commitment for television affiliation in the event it should be the successful applicant on VHF Channel 12. The applicant has announced that this commitment has been renewed within the past year, and that the nature of the commitment was such that CBS television network is bound to affiliate with the station in the event the grant is made to it on Channel 12.

(n) As a consequence of the above reported contractual commitments, petitioner is in danger of losing its CBS affiliation agreement upon the grant of VHF Channel 12 to said applicant.

The Commission is cognizant of the situation which presently exists with reference to the placement of advertising business of UHF stations. This situation exists not on the basis of any real difference between the services of the stations but on an artificial concept of the value of VHF vs. UHF, and has become a time-buying custom and tradition of the trade. The present attitude and policy of national and regional buyers of "spot" advertising upon which petitioner relies for a substantial portion of its revenue is to place their advertising upon a VHF station when that station commences operation in a community. Such advertisers are anxious to place their spot advertising adjacent to the programs of one of the major networks on a VHF station. Thus, a VHF station with a major network, competing with a UHF station, attracts most of such business and becomes the dominant station upon which the bulk of all advertisers seek availabilities.

Under such circumstances, the inception of operation of a VHF station with one of the major networks can result in such a severe loss of revenue to the UHF station that petitioner may be forced to curtail operations. This has been the history of many similarly situated UHF stations when a VHF commences operations in the same community. Petitioner believes it can compete with additional UHF stations in the area, with or without network affiliations, but that operation of a VHF station, under the circumstances of the present very real, although unjustified, policy of placement of advertising business, constitutes unfair competition to UHF stations in the community; that such unfair competition ultimately destroys and terminates UHF television service in the community, to the detriment of the public interest, and this has been the actual case of a number of UHF stations in recent months. While petitioner may have a self interest in attempting to preserve its UHF station, this interest parallels the public interest, for if the UHF stations must terminate operations in Fresno, the public will be left with one VHF station with no choice of programs as against the likelihood of three UHF stations, each serving a different network. With the disappearance of the UHF stations, the aggregate public investment in the more expensive R. 3575 all-channel receivers will be lost. This investment was made in reliance that the interest of the public in UHF receivers would be safeguarded by the surveillance and protection of the agency of the United States government charged with jurisdiction over communication matters.

17. The Commission has knowledge of these problems. This appears not only from the original proposed notice of rule-making and from the questions designated therein as pertinent in the first deintermixture matter designated for formal rule-making proceedings, but also from the voluminous data and comments filed in the docketed proceedings and from the oral argument. Furthermore, the Commission has had before it some thirty petitions seeking reallocation relief and has studied the questions in connection with Congressional inquiries and statements. In the latest notice of proposed rule-making in docket No. 11532, the Commission refers to these problems as "the familiar difficulties presently

facing television broadcasters". In the light of the above, the Commission cannot, and should not, take any action inconsistent with any feasible solution to the problem. To prevent such incompatibility petitioner requests that the Commission consolidate the above docketed proceedings with the rule-making proceedings so that all aspects of the problem and solution can be considered together, or, that the Commission permit petitioner to intervene in the above docketed proceedings to the same end.

18. In the event, however, the Commission does not see fit to grant the petition for consolidation or intervention, petitioner respectfully requests that the Commission hold in abeyance the final determination in the above docketed proceedings until a disposition of the rule-making proceedings in docket No. 11532. This also will avoid the incompatibility which the grant of authority for construction of a VHF channel in Fresno would have on the general rule-making proceedings and would be consistent with the expression of Commission policy as announced to the United States Senate Committee.

19. Should, however, the Commission see fit to deny the petitions and determine not to hold the above docketed proceeding in abeyance, then petitioner respectfully requests that the action in the above docketed proceedings be limited to a determination of the applicant to be preferred, R. 3576 the specification of the channel to be utilized by the successful applicant to await the outcome of the general rule-making proceedings, or that the grant of the construction permit, if a channel is specified, carry the condition that no construction be commenced until after the termination of proceedings in docket No. 11532.

WHEREFORE, petitioner prays that the Commission either

- (a) Consolidate the above proceedings with Docket No. 11532, or
- (b) Permit Petitioner to intervene in the above proceedings with a remand for further hearing therein, or
- (c) Hold in abeyance final determination in the above proceedings until a disposition of the rule-making proceedings in Docket 11532, or

(d) In the event that the foregoing petitions are denied, that the Commission either make the final decision and grant in the above proceedings subject to a later assignment of the specific channel to be utilized, such channel assignment to be made after completion of proceedings in Docket 11532, or that the grant of the construction permit carry the condition that no construction be commenced until after the termination of proceedings in Docket No. 11532.

Respectfully submitted,

O'NEILL BROADCASTING CO.

By: Joseph Brenner (signed)

* * *

Its Attorney
321 South Beverly Drive
Beverly Hills, California

November 23, 1955

IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

[Filed May 15, 1956]

O'Neill Broadcasting Company, Petitioner.)

v.)

Case Nos. 13,113
13,163

United States of America and)

Federal Communications Commission,)

Respondents,)

California Inland Broadcasting Company,)

Intervenor.)

O'Neill Broadcasting Company, Appellant.)

v.)

Case No. 13,164

Federal Communications Commission, Appellee,)

California Inland Broadcasting Company,)

Intervenor.)

PRE-HEARING STIPULATION

It is hereby stipulated by the parties in the above-entitled cases
that:

1. The printed brief of petitioner-appellant shall be filed and served on or before July 2, 1956, the printed briefs of the United States, the Federal Communications Commission and intervenor shall be filed and served on or before August 31, 1956, and petitioner-appellant's printed reply brief and the Joint Appendix shall be filed on or before September 24, 1956.

2. References to the record in the various briefs shall be to the page numbers in the original record filed with this Court. In printing the Joint Appendix, there shall be set forth both consecutive page numbers of the Joint Appendix and the original record page numbers of the material printed in the Joint Appendix.

3. Only such portions of the petitions for review and the notice of appeal as are designated by the parties shall be printed in the Joint Appendix, which shall contain the docket entries of the filing of these papers.

4. With the exception of the note below, the parties agree that the issues are as follows:

1. Whether the action of the Commission of January 12, 1956, in granting a VHF television station authorization to California Inland Broadcasting Company at Fresno, California, in a proceeding involving consideration of the comparative qualifications of two applicants was void.

a) by reason of the failure of the majority of the seven Commissioners present to agree that California Inland possessed the superior qualifications to serve the public interest;

b) by virtue of a separate decision of a Commissioner, without whose vote there would be no majority action, which failed to make a determination on the basis of comparative considerations, but determined the matter outside of said issues, i. e., on the basis of a need for the service, without necessary and adequate findings of fact to support such conclusion, without permitting Appellant to make a showing or

to be heard on that issue, and without consideration of any fact showing that the service to be established was not needed, and that the grant was not in the public interest.

2. Whether the Commission's orders of November 10, 1955, denying Appellant's rule-making petition to revise the table of television allocations to delete VHF Channel 12 from commercial use in Fresno, California, and to substitute a UHF channel therefor.

a) erroneously rested the decision upon ex parte presentations on television allocations problems made to the Commission without affording Appellant an opportunity to reply thereto;

b) erroneously failed to make necessary and adequate findings of fact; and

c) erroneously failed to state adequate reasons for the disposition of Appellant's petition for deintermixture.

3. Whether the Commission's orders of January 12, 1956, authorizing a first VHF television service in Fresno, constituted an unlawful prejudgment of Appellant's rule-making petition to make Fresno an all-commercial UHF area and a denial of Appellant's right to fair consideration of requested amendments of the Commission's rules in violation of Section 4 of the Administrative Procedure Act, and Section 1.701 of the Commission's Rules.

4. Whether the Commission, by its disposition of Appellant's rule-making petition and its denial of Appellant's requests for intervention, consolidation or stay, with respect to the proceedings in Intervenor's application, arbitrarily and capriciously denied Appellant an opportunity to demonstrate that the public interest would not be served by the establishment of a first VHF station in Fresno.

5. Whether in granting Intervenor's application for a construction permit for a television station, the Commission unlawfully failed to consider or pass upon issues affecting the public interest not part of the record in the licensing proceedings but presented to the Commission by Appellant for its consideration.

Note: The parties other than the petitioner-appellant believe that issue No. 1 has not been properly raised for consideration by this Court, and that in any event, the issue, if properly raised, should read as follows:

1. Whether the action of the Commission of January 12, 1956, in granting a VHF television station authorization to California Inland Broadcasting Company at Fresno, California, in a proceeding involving consideration of the comparative qualifications of two applicants was void because of the considerations taken into account by Commissioner Lee, without whose vote there would be no majority action.

5. The Government and the Intervenor further agree that their time for oral argument shall be apportioned as follows: 30 minutes for the Government and 15 minutes for Intervenor.

Samuel Miller
Counsel for O'Neill Broadcasting
Company

Daniel N. Friedman
Counsel for United States

Richard A. Solomon
Counsel for Federal Communica-
tions Commission

Harold B. Cohen
Counsel for California Inland
Broadcasting Company

May 11, 1956

UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

[Filed May 15, 1956]

APRIL TERM, 1956

No. 13,113

No. 13,164

O'Neill Broadcasting Co.,
Petitioner,O'Neill Broadcasting Co.,
Appellant,

v.

v.

United States of America and
Federal Communications Commis-
sion,Federal Communications
Commission,
Appellee,

Respondents,

California Inland Broadcasting
Co.,California Inland Broadcasting Co.,
Intervenor.

Intervenor.

No. 13,163

O'Neill Broadcasting Co.,
Petitioner,

v.

(Received May 17, 1956)

United States of America and
Federal Communications Commis-
sion,

Respondents,

California Inland Broadcasting Co.,
Intervenor.

Before: Washington, Circuit Judge.

PREHEARING ORDER

Counsel for the parties in the above-entitled cases having appeared before Circuit Judge Washington for prehearing conference pursuant to Rule 38 (k), of the General Rules of this Court, and counsel having submitted their stipulation dated May 11, 1956, and the stipulation having been considered, the stipulation of the parties is hereby approved, and it is

ORDERED that the parties proceed according to the stipulation and that this order and the stipulation dated May 11, 1956, be printed in the joint appendix.

Dated:

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed February 21, 1956]

O'NEILL BROADCASTING CO.,

Petitioner

v.

UNITED STATES OF AMERICA,

and

FEDERAL COMMUNICATIONS COMMISSION,

Respondents

No. 13,113

MOTION TO INTERVENE

California Inland Broadcasting Company, pursuant to Section 402 (a) of the Communications Act of 1934, as amended, [47 U.S.C. Sec. 402(a)] which incorporates by reference Section 8 of the Judicial Review Act of 1950 [5 U.S.C. Sec. 1038] moves to intervene, as of right, as a party respondent in the above entitled action on the ground that its interests will be adversely affected if the challenged Order of the Federal Communications Commission is enjoined, set aside, or suspended by this Court.

In support whereof, it is stated:

After a hearing on the mutually exclusive applications of Movant and a third party the Commission awarded to Movant a permit authorizing construction of a television station for commercial operation on VHF Channel 12 at Fresno, California. The Report and Order of the Commission which Petitioner seeks to have reviewed in this action is the denial of its petition for "de-intermixture" of the Fresno area so as to eliminate the availability of Channel 12 for commercial television service in Fresno and to provide that the Fresno market receive commercial service exclusively from UHF television stations.

The interests of the Movant will be adversely affected if the Report and Order of the Respondent Commission is enjoined, set aside, or suspended by this Court since the Movant would be precluded from constructing its station for operation on Channel 12 at Fresno, California, as

authorized in the public interest, convenience and necessity, and it would be deprived of such rights as it has acquired under the terms of said authorization.

Respectfully submitted,

Harold D. Cohen

Pierson, Ball & Dowd

* * *

Attorneys for

California Inland Broadcasting Co.

Dated February 21, 1956.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed February 15, 1956]

O'NEILL BROADCASTING CO.,
Petitioner

v.

UNITED STATES OF AMERICA,
and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents

)
)
) No. 13,163
)
)
)

MOTION TO INTERVENE

California Inland Broadcasting Company, pursuant to Section 402(a) of the Communications Act of 1934, as amended, [47 U.S.C. Sec. 402 (a)] which incorporates by reference Section 8 of the Judicial Review Act of 1950 [5 U.S.C. Sec. 1038] moves to intervene, as of right, as a party respondent in the above entitled action on the ground that it was a party to the proceeding before the Federal Communications Commission and that its interests will be adversely affected if the Order of that agency is enjoined, set aside, or suspended by this Court.

In support whereof, it is stated:

After a hearing on the applications of Movant and a competing applicant for permits to construct a television station for commercial

operation on Channel 12 at Fresno, California, the Commission awarded said grant to Movant. The Order of the Commission which Petitioner seeks to review in this action involves (1) the dismissal of its petition for a stay of a grant of Channel 12 pending a final determination of all matters before the Commission involving Petitioner's request for re-assignment of that channel and (2) the denial of its petition for consolidation of the Channel 12 adjudicatory proceeding with the Commission's general rule-making proceeding in the so-called "de-intermixture" proceedings, or for intervention therein and for other relief. In its application to this Court for Interlocutory Injunction Petitioner also seeks a stay of the effectiveness of the permit authorizing Movant to construct its station.

The interests of the Movant will be adversely affected if the Order of the Respondent Commission is enjoined, set aside, or suspended by this Court since the Movant would be precluded from constructing its station for operation on Channel 12 at Fresno, California, as authorized in the public interest, convenience and necessity, and it would be deprived of such rights as it has acquired under the terms of said authorization.

Respectfully submitted,

Harold D. Cohen

Pierson, Ball & Dowd

* * *

Attorneys for

California Inland Broadcasting Co.

Dated February 15, 1956.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed February 15, 1956]

O'NEILL BROADCASTING CO. ,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

No. 13,164

NOTICE OF INTENTION TO INTERVENE

California Inland Broadcasting Company, a corporation organized and existing under the laws of the State of California, and holder of a duly authorized permit of the Federal Communications Commission for the construction of Television Station KFRE-TV in Fresno, California, hereby states, pursuant to Section 402 (e) of the Communications Act of 1934, as amended [47 U.S.C. Sec. 402(e)] that it is entitled to participate in the proceedings to be had upon the above-captioned Appeal and hereby gives notice that it intends to intervene therein for the reasons set forth in the attached statement of Intervenor's Interest.

CALIFORNIA INLAND BROADCASTING CO.

By

Harold D. Cohen

* * *

Its Attorneys

Dated this 15th day of February, 1956.

RS. 57

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In the Matter of

Amendment of Part 3 of the
Commission's Rules and Regu-
lations Governing Television
Broadcast Stations.

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MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Hyde dissenting for the same rea-
sons set forth in his dissent in the Report and Order in Docket
Nos. 11238 et al; Commissioner Bartley dissenting.

1. The Commission has before it for consideration the following
petitions seeking to amend the Table of Assignments contained in Sec-
tion 3.606 of its rules and regulations and other rules and standards re-
lating to television broadcast stations:

*	*	*	*	*	*	*
<u>Date Filed</u>		<u>Petitioner</u>		<u>Request</u>		
RS. 58 4/7/55		O'Neill Broadcasting Co. Fresno, Calif.		Shift educational reser- vation from Ch. 18 to Ch. 12 in Fresno.		

* * * * * *

RS. 60 2. The foregoing petitions seek to institute rule making proceed-
ings to consider new television channel assignments, and also to con-
sider other amendments, to the television rules and standards which
would constitute basic departures from our present allocation plan and
standards promulgated in the Sixth Report and Order. For example,
some of the petitions contemplate the assignment of VHF channels at
separations below those presently specified, coupled with the use of low
power operation and directional antennas. Others request departure from
the principle of intermixture of VHF and UHF channels, employed in the
present allocation plan. The petitions, however, are all designed to
alter the television assignments in an individual community or a limited
area.

3. The Commission is today instituting a general rule making proceeding to consider amendments to its present television allocation plan and rules on a nationwide basis. The Commission points out in its Notice announcing that proceeding that the difficulties now confronting the television service, while they affect individual communities, are national in scope and may have far-reaching implications for the future of the television system as a whole; and the Commission expresses its conclusion that any approach to their consideration must, of necessity, take cognizance of the broad scope of the general problem.

4. In the Commission's view it would be neither appropriate nor feasible to approach the problem on the basis of separate, individual petitions designed to alleviate conditions in an individual community or a limited area, through departures from the present structure of channel assignments or existing television standards. In our view, it would be fruitless to undertake to consider this nationwide problem through piecemeal measures, which neither promise significant overall relief, nor would necessarily be consistent with such action as the Commission may find it appropriate to take in its general proceeding.

5. Accordingly, the Commission does not believe that the institution of rule making proceedings in the above-mentioned petitions would be warranted at this time. The petitioners will, of course, have full opportunity to submit their views with respect to the overall, nationwide problem in the general rule making proceeding we are instituting today. When the Commission may have determined the broad basis of any desirable revisions to its present allocation scheme and related rules, it will be in a position to consider questions, such as those raised by the subject petitions, concerning specific channel assignments in individual communities or limited areas.

6. In view of the foregoing, IT IS ORDERED, That the aforementioned petitions for rule making listed in paragraph 1 above, ARE DENIED.

* * * * *

RS. 61

Federal Communications Commission

Adopted: November 10, 1955

/s/ Mary Jane Morris
Secretary

Released: November 10, 1955

R 3605

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of

CALIFORNIA INLAND BROADCASTING COMPANY)
Fresno, California)

Docket No. 9050
File No. BPCT-413

KARM, THE GEORGE HARM STATION)
Fresno, California)

Docket No. 10650
File No. BPCT-1061

For Construction Permits for New
Television Stations (Channel 12))

* * * * *

DECISION

By the Commission: Chairman McConnaughey voting for KARM; Commissioners Hyde and Bartley voting against a grant of either application at this time and issuing a statement; Commissioner Lee concurring and issuing a statement

Preliminary Statement

1. In this proceeding, California Inland Broadcasting Company (hereinafter sometimes referred to as California Inland or KFRE), and KARM, The George Harm Station (hereinafter sometimes referred to as KARM) seek a permit to construct a new commercial television broadcast station to operate on Channel 12 in Fresno, California. Their applications were designated for hearing in a consolidated proceeding by Commission Order of August 20, 1953. In the order of designation it was found that the applications were mutually exclusive and therefore that a hearing pursuant to the requirements of Section 309 (b) of the Communications Act of 1934, as amended, was mandatory to determine on a comparative basis which applicant would better serve the public interest, convenience and necessity. It was further found that California Inland Broadcasting Company was legally, financially and technically qualified to construct, own and operate a television broadcast station and that KARM, The George Harm Station, was legally and technically qualified to construct, own and

operate a television broadcast station. ^{1/} The order of designation set forth the following issues:

R. 3606

1. To determine whether KARM, The George Harm Station, is financially qualified to construct, own and operate its proposed television broadcast station.

2. To determine on a comparative basis which of the operations proposed in the above-entitled applications would better serve the public interest, convenience and necessity in the light of the record made with respect to the significant differences between the applications as to:

^{1/} This action is consistent with Commission processing procedures in comparative proceedings under which factors not subject to comparative consideration if possible are resolved at the time of designation for hearing. Where the Commission has information before it relative to the legal, technical and financial qualifications upon which it is able to determine that an applicant meets the basic statutory qualifications, which are absolute rather than comparative factors, the order of designation sets forth the Commission's findings to this effect, thus expediting the hearing as well as the Commission's administrative processes. Such findings are subject to review upon petition properly filed by a party to the proceeding requesting enlargement of issues. Upon a showing that the Commission's determination is in error or that substantive evidence can be adduced in contravention of any of the matters relied upon by the Commission in its determination, the legal, technical or financial qualifications of an applicant will be placed in issue. KARM here contends that the Commission's determination relative to the financial qualifications of KFRE was erroneous and, in addition, that the Commission is required to give comparative consideration to financial qualifications of the applicants. With reference to the latter contention, we believe it is adequately answered by the decision of the United States Court of Appeals, District of Columbia Circuit, in Scripps-Howard Radio, Inc. v. FCC, 189 F. 2d 677, cert. denied, 342 U.S. 850. In that case the Commission's position that financial qualifications were not a factor for comparative consideration was specifically upheld. In the present proceeding the funds available to each applicant were determined upon the basis of evidence submitted with or as amendments to the applications. This evidence was considered and the Commission found in its original order that KFRE was financially qualified, and by a subsequent order that KARM was so qualified. Through enlargement of issues by the Examiner under authority granted to him by the Commission, this finding was limited to a determination that the applicants had available the funds shown. The adequacy of these funds to effectuate the applicants' respective proposals was placed in issue.

(a) The background and experience of each of the above-named applicants having a bearing on its ability to own and operate the proposed television station.

(b) The proposals of each of the above-named applicants with respect to the management and operation of the proposed station.

(c) The programming service proposed in each of the above-entitled applications.

* * * * *

R. 3672 SUMMATION

44. We now come to our final evaluation of the applicants. We have here two applicants with long records in the broadcast field, both of whom have chosen to place such records before the Commission for review in this proceeding except as to those matters--set forth in paragraph 2 of our conclusions--on which the parties stipulated they both had equally meritorious records. Throughout the entire record one major difference between the parties has woven itself as an almost continuous thread. This major difference lies in the field of sensitivity to the needs of the area. Here a disparity is shown between the parties with respect to their efforts to remain constantly aware of these needs and the steps they have taken to serve them through their respective stations. The principals of KFRE have actively participated in a great number of the civic activities of the community. They have been particularly active in educational fields, from both a broadcast and non-broadcast standpoint and have worked with and encouraged the production of educational programs by the dominant educational institution of the area. They have maintained this same close contact with agricultural activities in a community in which agriculture is the dominant industry; the results of these efforts have been reflected in the superior agricultural programming of station KFRE. Through this awareness of community needs it has developed a programming format of its station KRFM which provides a service unavailable from any other source insofar as the record of this proceeding discloses. While KARM has a meritorious record in its

cooperation with local educational and other organizations and has devoted equally substantial broadcast time to them, it shows no such record of active cooperation with them and awareness of their needs.

KFRE's superiority in these considerable areas of past performance, together with the noted superiority of KFRE in integration of ownership and management, and the more active participation of its principals in community affairs, give greater assurance to the Commission that the aforesaid sensitivity to and awareness of the local needs of the area will be reflected in its proposed television operation. It follows that KFRE has sustained its points of reliance in the factors of integration of ownership with management, in the factor of participation by its principals in

R. 3673 local organizations and that both these factors and its record of past performance do give greater assurance of effectuation of its proposals and the rendering of a service more sensitive and responsive to the needs, interests and desires of the persons to be served; further that KFRE has sustained its point of reliance as to superiority in knowledge of the broadcast needs and interests of the area to be served. We conclude that it has not established its other points of reliance; but this is not decisive in the circumstances before us.

45. The points of reliance of KARM were more limited than those of KFRE. It did establish that it was responsible for the establishment of a split-wire news service in Fresno and that it did assist in securing more accurate and complete weather reporting service. However, while indicating KARM's desire to serve the community, these two events occurred a number of years prior to the hearing and no showing was made of other comparable efforts (or even that KARM had fully availed itself in its station programming of the additional weather reporting service which the Weather Bureau did make available). KARM and the other stations in the area all utilize the split-wire news service in their programming. Thus, while KARM has established to the extent stated its point of reliance as to "pioneering" agencies and programs in Fresno to provide needed public services, we cannot conclude that the matter is of such import as to be given considerable weight in this comparison. The other KARM

points of superiority alleged, we have seen, it has not sustained.

46. In view of the foregoing considerations we conclude that KFRE is to be preferred over KARM

47. Accordingly, IT IS ORDERED, This 11th day of January, 1956, that the application of California Inland Broadcasting Company for a permit to construct a new commercial television station at Fresno, California, on Channel 12 IS GRANTED, subject to the condition that its antenna structure will be painted and lighted in accordance with Part 17 of the Commission's Rules; and that the application of KARM, The George Harm Station for the use of the same channel assigned to Fresno, California, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Wm. P. Massing
Acting Secretary

Released: January 12, 1956

R. 3683

CONCURRING OPINION OF COMMISSIONER LEE

I have examined the applications of KARM and KFRE and have found that the grant of either of them - were they not mutually exclusive - would be in the public interest.

The situation which confronted us before my present vote was that three commissioners favored KFRE and two KARM (Chairman McConaughy and myself); the remaining two commissioners did not favor any grant at this time.

It is my personal opinion that such a situation provides a legal grant to KFRE. However, to avoid any question that a voting impasse has resulted, I believe that it is more in the public interest for me to concur in the majority opinion, finding that the KFRE application should be granted.

The Commission's original vote, if allowed to stand, would, in effect "freeze" the television situation in Fresno and the people of the area

would be denied a service they have been waiting for since 1948; and it would likewise "freeze" the competing applicants who have spent much time and money prosecuting this case.

As in most of the remaining comparative cases, both the competing applicants can be expected to provide a television service in the public interest. While there are factors in this proceeding which inclined me toward KARM, the applicants are so nearly equal that on the basis of the proposals of each, I believe either would provide a meritorious service to the public, and I am satisfied to join the majority.

I am anxious to do my part to bring this needed and vital service to the people of the Fresno area without great loss of time. This latter factor - the need to bring a vital service without further lengthy delay - appears to me to be the overriding public interest consideration.

As a Commissioner, I feel that my first responsibility is to the listening public. I believe I should do whatever I can to prevent a "freeze" in Fresno, and therefore I now vote for the decision.

R. 3601

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of

CALIFORNIA INLAND BROADCASTING CO.
Fresno, California

KARM, THE GEORGE HARM STATION
Fresno, California

For Construction Permits for

New Television Stations (Channel 12)

) Docket No. 9050

) File No. BPCT-413

) Docket No. 10650

) File No. BPCT-1061

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioners Hyde and Bartley dissenting.

1. The Commission has under consideration: (1) a petition filed on October 17, 1955 by O'Neill Broadcasting Company requesting a stay in the above-entitled proceeding until after final determination of all matters pending before the Commission involving reassignment of Channel 12 now allocated to the city of Fresno; (2) a petition filed on November 30, 1955 by O'Neill Broadcasting Company for consolidation, intervention and other relief; (3) oppositions to the said petitions filed by California Inland Broadcasting Company and KARM, The George Harm Station; (4) Motion of O'Neill Broadcasting Company for Extension of Time to File Reply to Opposition; and (5) Reply to opposition filed on December 15, 1955 by O'Neill Broadcasting Company.

2. O'Neill Broadcasting Company had pending at the time of filing its petition herein of October 17, 1955 a Petition for Rule Making requesting that Channel 12 be reserved for a noncommercial educational television operation in Fresno in lieu of the present reservation of Channel 18 and that Channel 18 be made available for commercial assignment. ^{1/} However, by Memorandum Opinion and Order released on November 10, 1955, (FCC 55-1126 Mimeo No. 24919) the said Petition

^{1/} Channel 12 is the only VHF channel allocated to the city of Fresno, California. Therefore, under present allocations this channel would have effected deintermixture of commercial television assignments in Fresno.

for Rule Making was denied together with 29 other such petitions. Among these was a petition filed by Bakersfield Broadcasting Company requesting that Channel 12 be deleted from Fresno and assigned to Bakersfield, California. Five additional such petitions on which oral argument had been heard were also disposed of by separate Report and Order (FCC 55-1175 Mimeo No. 29978). On this same date, a general Rule Making Proceeding (Docket No. 11532) was instituted through issuance of a "Notice of Proposed Rule Making" to consider on a nation-wide basis possible overall solutions to the numerous problems and proposals which have arisen relative to the allocation of television channels.

R. 3602 3. The above petition of O'Neill Broadcasting Company filed on November 30, 1955 requests (a) that the above-entitled proceeding be consolidated with the said Rule Making proceeding in Docket No. 11532, or (b) that petitioner be permitted to intervene in the above-entitled proceedings with a remand for further hearing, or (c) that final determination in the above-entitled proceeding be held in abeyance until disposition of the Rule Making proceeding in Docket No. 11532, or in the alternative, that the Commission either make a final decision and grant in the above-entitled proceeding subject to a later assignment of the specific channel to be utilized, such assignment to be made after completion of the proceedings in Docket No. 11532, or that the grant of the construction permit carry the condition that no construction be commenced until after termination of the proceedings in Docket No. 11532.

4. In support of its requests for intervention or consolidation, O'Neill Broadcasting Company points out that there are at present two operating UHF television stations in the city of Fresno and an outstanding construction permit for a third station. It is asserted that the existing UHF stations in Fresno will be in economic and commercial competition with the successful applicant in the above-entitled proceeding and that unless a grant herein is delayed serious injury to the public and severe economic injury to petitioner will result. Petitioner further asserts that, although its previous petition for rule making has been denied, such action was not on the merits and that it will again urge

the matters contained therein in the rule making proceeding in Docket No. 11532. It is asserted that the rule making proceeding, as it relates to the city of Fresno primarily, involves the question as to whether the Commission should make a grant on Channel 12 or whether it should be made on some other channel. Petitioner contends that a grant of Channel 12 at the present time in the instant proceeding would therefore in effect constitute action in the general rule making proceeding. On the basis of this contention, it is requested that the Commission either consolidate the instant proceeding with the general rule making proceeding or permit petitioner to intervene in the instant proceeding so that it may make a full and complete showing of the impact of the Commission's action should authorization be given at the present time for operation on a VHF channel at Fresno. Petitioner states that it does not seek intervention in relation to the issues of comparative qualifications of the above applicants, its only interest being that a grant herein "would be tantamount to an adverse decision in the rule making proceedings, and would preclude and render ineffectual any relief that may be forthcoming in the rule making proceeding." If permitted to intervene, petitioner has set forth a number of matters upon which it will seek determination and consideration.

5. Relative to the assertion of economic injury, it is set forth that one of the applicants in the instant proceeding has a positive commitment from Columbia Broadcasting System for affiliation with that network and that petitioner's station presently holds network affiliations with both American Broadcasting Company and Columbia Broadcasting System. Therefore, petitioner is faced with possible loss of one of its network affiliations.

R. 3603 6. As reason for having failed to earlier seek intervention, petitioner states that it was not until the Commission's action of November 10, 1955 dismissing its said petition for rule making that the necessity for filing a request for intervention or consolidation arose. It is further asserted that under the present attitude and policies of national and regional buyers of spot advertising upon which petitioner relies for a substantial portion of its revenue, such advertising will be placed on a VHF

station rather than on petitioner's UHF station. It is urged that the economic losses to the existing UHF stations may well be such as to result in curtailment or termination of their services and therefore, "while petitioner may have a self-interest in attempting to preserve its UHF station, this interest parallels the public interest for if the UHF stations must terminate operations in Fresno, the public will be left with one VHF station with no choice of programs as against the likelihood of three UHF stations, each serving a different network."

7. O'Neill Broadcasting Company, on December 5, 1955 filed its motion herein for extension of time to December 14, 1955 in which to file a reply to the opposition of California Inland Broadcasting Company to O'Neill's said petition of November 30, 1955 for consolidation, intervention and other relief. However, without action having been taken on this motion, a Reply to opposition was filed by O'Neill on December 15, 1955 together with a request that the Commission accept the reply for filing. ^{2/}

Conclusion

8. As set forth in paragraph 2, supra, the petition of O'Neill Broadcasting Company filed on October 17, 1955 requesting a stay of the instant proceeding was founded on the petitions of Bakersfield Broadcasting Company and of O'Neill Broadcasting Company for rule making which were denied on November 10, 1955. Therefore, this petition has become moot and must be dismissed.

9. We now turn to the pleading of O'Neill Broadcasting Company filed on November 30, 1955. The requests for consolidation of the instant adjudicatory hearing with the General Rule Making Proceeding in Docket No. 11532 or for intervention must be denied. The application of O'Neill Broadcasting Company resulting in a grant authorizing constitution of a station KJEO-TV was filed on August 25, 1952. It was granted

^{2/} This request in effect constitutes a request for waiver pursuant to Section 1.702 of the Commission's Rules of that part of Section 1.730 of the Rules which provides that replies to oppositions must be filed within five days after filing of the opposition.

on April 8, 1953 with special temporary authorization for operation being given on August 27, 1953. The station commenced actual operation on October 1, 1953. The application of California Inland Broadcasting Company was filed on April 13, 1948 and that of KARM, The George Harm Station on June 30, 1952. The latter applications were designated for hearing in a consolidated proceeding by Commission Order of August 20, 1953. Hearing was held and on September 9, 1954, the Examiner released his Initial Decision. Thus, O'Neill Broadcasting Company filed and prosecuted its application with full knowledge of the pendency of the R. 3604 applications for operation on Channel 12. It at no point has previously sought to intervene in these proceedings and intervention at this late date with the consequent disruption to the proceeding cannot be permitted even if it be assumed that there is merit to petitioner's contentions. A second consideration is that petitioner has set forth no matter showing how its participation will assist the Commission in the determination of the issues in the hearing proceeding and, in fact, petitioner disclaims all interest in these issues. Rather petitioner contemplates interposing into this adjudicatory proceeding rule making matters and economic injury to existing broadcast services. We believe rule making matters, which are of general applicability, improper for consideration in this adjudicatory proceeding. The reasons therefore are more fully discussed in our Memorandum Opinion and Order and Decision In re Application of Gulf Coast Broadcasting Company, Docket No. 11559, paragraphs 6 through 9, adopted on December 7, 1955 to which specific reference is here made.

10. The alternative relief requested herein which in effect requests in various forms stay of the proceedings will not be granted for the reasons fully discussed in our Memorandum Opinion and Order and Decision in re Application of Gulf Coast Broadcasting Company, Docket

No. 11559, paragraphs 6 through 9, adopted on December 7, 1955 to which specific reference is here made.

Accordingly, IT IS ORDERED, This 11th day of January, 1956 that the petition of O'Neill Broadcasting Company requesting final action in this proceeding be held in abeyance until after final determination of all matters pending before the Commission involving reassignment of Channel 12 and its said Motion for Extension of Time to File Reply ARE DISMISSED AS MOOT; that a waiver of Section 1.730 of the Commission's Rules IS GRANTED and the said reply of O'Neill Broadcasting Company IS ACCEPTED; and that the said petition of O'Neill Broadcasting Company for consolidation, intervention and other relief IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Wm. P. Massing

Acting Secretary

Released: January 12, 1956.

BRIEF FOR PETITIONER-APPELLANT.

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 13,113

No. 13,163

FILED

JUL 9 1956

O'NEILL BROADCASTING CO.,

vs.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

CALIFORNIA INLAND BROADCASTING COMPANY,

Petitioner,

Respondents,

Intervenor.

No. 13,164

O'NEILL BROADCASTING CO.,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

CALIFORNIA INLAND BROADCASTING COMPANY,

Appellant,

Appellee,

Intervenor.

**On Petitions for Review and Appeal From Decision and
Orders of the Federal Communications Commission.**

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Petitioner-Appellant.*

July 9, 1956.

Statement of Questions Presented.

[Nos. 13,113, 13,163, 13,164.]

At a prehearing conference ordered by this Court, the parties stipulated the issues presented by these cases. With the exception of the note below, the issues, as stipulated, and subsequently approved by this Court on May 11, 1956, are as follows:

1. Whether the action of the Commission of January 12, 1956, in granting a VHF television station authorization to California Inland Broadcasting Company at Fresno, California, in a proceeding involving consideration of the comparative qualifications of two applicants was void.

(a) by reason of the failure of the majority of the seven Commissioners present to agree that California Inland possessed the superior qualifications to serve the public interest;

(b) by virtue of a separate decision of a Commissioner without whose vote there would be no majority action, which failed to make a determination on the basis of comparative considerations, but determined the matter outside of said issue, *i.e.*, on the basis of a need for the service, without necessary and adequate findings of fact to support such conclusion, without permitting appellant to make a showing or to be heard on that issue, and without consideration of any fact showing that the service to be established was not needed, and that the grant was not in the public interest.

2. Whether the Commission's orders of November 10, 1955, denying appellant's rule-making petition to revise the table of television allocations to delete VHF Channel 12 from commercial use in Fresno, California, and to substitute a UHF channel therefor.

(a) erroneously rested the decision upon *ex parte* presentations on television allocations problems made to the Commission without affording appellant an opportunity to reply thereto;

(b) erroneously failed to make necessary and adequate findings of fact; and

(c) erroneously failed to state adequate reasons for the disposition of appellant's petition for deintermixture.

3. Whether the Commission's orders of January 12, 1956, authorizing a first VHF television service in Fresno, constituted an unlawful prejudgment of appellant's rule-making petition to make Fresno an all-commercial UHF area and a denial of appellant's right to fair consideration of requested amendments of the Commission's rules in violation of Section 4 of the Administrative Procedure Act, and Section 1.701 of the Commission's Rules.

4. Whether the Commission, by its disposition of appellant's rule-making petition and its denial of appellant's requests for intervention, consolidation or stay, with respect to the proceedings in Intervenor's application, arbitrarily and capriciously denied appellant an opportunity to demonstrate that the public interest would not be served by the establishment of a first VHF station in Fresno.

5. Whether in granting Intervenor's application for a construction permit for a television station, the Commission unlawfully failed to consider or pass upon issues affecting the public interest not part of the record in the licensing proceedings but presented to the Commission by appellant for its consideration.

Note: The parties other than the petitioner-appellant believe that issue No. 1 has not been properly raised for consideration by this Court, and that in any event, the issue, if properly raised should read as follows:

1. Whether the action of the Commission of January 12, 1956, in granting a VHF television station authorization to California Inland Broadcasting Company at Fresno, California, in a proceeding involving consideration of the comparative qualifications of two applicants was void because of the consideration taken into account by Commissioner Lee, without whose vote there would be no majority action.

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,113

No. 13,163

O'NEILL BROADCASTING CO.,

Petitioner,

vs.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

CALIFORNIA INLAND BROADCASTING COMPANY,

Intervenor.

No. 13,164

O'NEILL BROADCASTING CO.,

Appellant,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

CALIFORNIA INLAND BROADCASTING COMPANY,

Intervenor.

On Petitions for Review and Appeal From Decision and
Orders of the Federal Communications Commission.

BRIEF FOR PETITIONER-APPELLANT.

Jurisdictional Statement.

These cases involve petitions for review and appeal by O'Neill Broadcasting Co., pursuant to Section 402(a) and 402(b) of the Communications Act of 1934, as amended (47 U. S. C., Sec. 402(a) and (b)), Sections 2, 3 and 4 of the Judicial Review Act of 1950 (5 U. S. C., Secs. 1032, 1033, 1034), and Section 10 of the Administrative Procedure Act (5 U. S. C., Sec. 1009).

Case No. 13,113 is a petition by O'Neill Broadcasting Co., pursuant to Section 402(a) of the Communications Act, for review of an order released by the Commission on November 10, 1955 [R. 57-61],¹ which denied without hearing or other process, without further proceedings and without consideration of its merits, a Petition for Rule Making, filed with the Commission by petitioner on April 7, 1955 [R. 1-4].¹ The petition was for so-called "deintermixture" of the television channels at Fresno, California, by reassignment of channels involving a deletion or reassignment of VHF channel 12 as a commercial channel.

Case No. 13,164 is an appeal by O'Neill Broadcasting Co., pursuant to Section 402(b) of the Communications Act from a Memorandum Opinion and Order and Decision released by the Commission on January 12, 1956 [R. 3601-3604, 3684-3685]² which (1) purported to grant by final action in Docket Nos. 9050 and 10650 the application of California Inland Broadcasting Company, the intervenor herein, for a television station to operate on VHF channel 12 at Fresno, California; (2) dismissed as moot a petition of O'Neill Broadcasting Co. [R. 3545]² to hold in abeyance final action in the VHF proceedings in Dockets No. 9050 and No. 10650 until proceedings pending before the Commission involving the reassignment of channel 12 were determined; and (3) denied the petition of O'Neill Broadcasting Co. [R. 3564]² for alternative relief, which requested that the Commission (i) either consolidate the VHF channel 12 proceedings with the reassignment proceedings, or (ii) permit O'Neill Broadcasting Co. to intervene in those proceedings with a remand for further hearing on certain specifically designated issues as to whether the

¹In case No. 13,113.

²In case No. 13,150.

grant of the VHF channel would be in the public interest; or (4) in the event of the denial of the above, that the Commission hold final determination in the VHF proceedings in abeyance until disposition of the general rule-making proceedings, or make any final grant in those proceedings subject to the assignment at a later date of the specific channel to be utilized, or that the grant of construction permit carry the condition that no construction be commenced until after the determination of the general rule-making proceeding.

Case No. 13,163 is a petition by O'Neill Broadcasting Co. pursuant to Section 402(a) of the Communications Act for review of the same Memorandum Opinion and Order and Decision released by the Commission on January 12, 1956, which is the subject of appeal in case No. 13,164. Although appellant believes that the Memorandum Opinion and Order and Decision of January 12, 1956, are appealable pursuant to Section 402(b), it appreciates that the applicability of this section to the orders involved might be placed in question, thus a review has also been sought under Section 402(a) which provides for judicial review of any Commission order not reviewable under Section 402(b). Appellant is of the opinion that the orders denying intervention, consolidation and stay with respect to Dockets 9050 and 10650 were orders entered in the course of the proceedings leading to the grant of Intervenor's application, and are therefore reviewable on appeal from such grant, pursuant to Section 402(b). *Federal Communications Commission v. National Broadcasting Company, KOA*, 319 U. S. 239 (1943). Appellant is a permittee of an operating UHF television station in the same area which will receive service from the proposed station. *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470 (1940). Furthermore appellant is a petitioner before the Commis-

sion for reassignment of channels, to reassign channel 12 from Fresno. *Logansport Broadcasting Corp. v. United States*, 93 U. S. (App. D. C.) 342, 210 F. 2d 24 (1954). Therefore, appellant's interests were adversely affected by the action granting Intervenor's application for VHF channel 12, at Fresno. On the other hand, the order of November 10, 1955 [R. 57]³ was an order denying rule-making petition of petitioner. This order does not fall within any of the categories listed in Section 402(b). Accordingly, it is reviewable under Section 402(a).

The petition for review in case No. 13,113 was filed in this Court on the 9th day of January, 1956. The appeal and petition for review in case Nos. 13,163 and 13,164 were filed in this Court subsequent thereto. All three proceedings have been consolidated by order of this Court.

Statement of the Case.

Appellants-petitioner⁴ is a California corporation, with principal offices at Fresno, California. It owns and operates UHF television station KJEO on channel 47 in Fresno. The station has been in actual operation for more than two years.

Section 3.606 of the Commission's rules provides for the assignment to Fresno, California, for commercial purposes of UHF channels 24, 47, 53 and VHF channel 12. UHF channel 18 is reserved for educational purposes.

Station KMJ-TV, operates on UHF channel 24 at Fresno; that station has also been in operation for more than two years. In addition, a construction permit on UHF channel 53 at Fresno is outstanding. That station was constructed and was in operation for a brief period,

³In case No. 13,113.

⁴Hereafter referred to as appellant or petitioner, or O'Neill.

but is now off the air, having encountered economic difficulties. No application has been made for the educational reservation on UHF channel 18. The nearest community with an operating television station is Tulare, California, approximately 45 miles from Fresno. The station there (KVVG) operates on UHF channel 27. The nearest community with either an assigned or operating VHF station is Bakersfield, California, 103 miles air-line distant from Fresno, where KERO-TV operates on VHF channel 10. Bakersfield has also assigned to it a UHF channel (29) upon which KBAK-TV operates.

Two mutually exclusive applications were filed for the VHF channel 12 assigned to Fresno and a comparative hearing was held on the applications. (Dockets Nos. 9050 and 10650.) An initial decision by the hearing examiner was released; exceptions were filed to this initial decision and oral argument thereafter had before the Commission on December 17, 1954. The matter had been ready for final decision by the Commission since that date.

On April 7, 1955, O'Neill filed a petition for rule-making with the Federal Communications Commission [R. 1-4],⁵ which sought to change the television channel assignments at Fresno, California, so as to make the commercial assignments to that city all UHF by deleting VHF channel 12 as a commercial assignment, and substituting channel 18 instead, making channel 12 available for educational, non-commercial purposes in lieu of the reserved channel. A stay of the VHF proceedings pending the determination of this petition was also requested. This petition was denied by the Commission by Report and Order adopted and released November 10, 1955 [R. 57-61]⁵ without hearing or other process and without

⁵In case No. 13,113.

consideration of its merits. This Report and Order is the subject of the petition and review in case No. 13,113.

On May 13, 1955, the Bakersfield Broadcasting Co., operators of television station KBAK-TV at Bakersfield, also filed a petition for deintermixture to delete channel 12 from Fresno and to assign it to Bakersfield so that Bakersfield might become an all-VHF community; the city already having Station KERO-TV, operating on VHF channel 10. Other petitions were also filed seeking the use of channel 12 elsewhere.

The denial of O'Neill's petition for deintermixture was not, nor did it purport to be, on the merits, but was made only so that the matters presented might be considered by the Commission on a broader scope in the general rule-making proceedings. No findings were made, nor any consideration given to the television situation at Fresno, nor to the similarity or lack of it to other areas or whether a decision could be reached in Fresno independently of other areas.

O'Neill's petition for deintermixture also contained a request that final decision in the VHF channel 12 proceedings be made subject to the outcome of the proceedings in the deintermixture proceeding. The Commission's order of November 10 did not pass on the request for stay and it can only be assumed that the denial of the petition also included a denial of the request.

On October 17, 1955, prior to the above order, petitioner filed in the VHF proceedings a petition [R. 3545]⁶ to hold in abeyance the final action in the proceedings until such time as matters involving reallocation of channel 12, which might require inconsistent action, were determined and until after final determination of all matters pending before the Commission involving the reassignment

⁶In case No. 13,150.

of VHF channel 12. This was done so that no adverse action would be imposed on the deintermixture proceedings by reason of final action in the VHF proceedings. It was not clear from the order of the Commission issued November 10, 1955, whether the Commission intended also to deny this petition because of its dependence upon the petition for deintermixture, included in the Commission's denial. However, in its Memorandum of Opinion and order of January 12, 1956 [R. 3601, 3685],⁷ the Commission referred to said petition of October 17, 1955 and dismissed it as moot. This dismissal is part of the subject on appeal in this matter.

No action whatsoever was taken by the Commission on the petition for rule-making, from the date of its filing on April 7, 1955, until its denial on November 10, 1955. Similarly, no final action was taken in VHF proceedings until the action of January 12, 1956 discussed hereafter.

On November 10, 1955, it became apparent that the Commission might refuse to consider the merits of the petition for deintermixture which had been on file since April, 1955, before taking action on the VHF applications.

Accordingly, on November 29, 1955, O'Neill filed in the VHF proceedings a Petition for Consolidation, Intervention and Other Relief [R. 3564],⁷ in which it sought in the alternative either to consolidate the VHF proceedings with the general rule-making proceedings in Docket No. 11532, or that O'Neill be permitted to intervene in the VHF proceedings with a remand for further hearing therein, or that the Commission hold in abeyance the final determination in the VHF proceedings until a disposition of the rule-making proceedings in Docket No. 11532, or in the event that the Commission should deny the petition, that any final decision be without specification of a channel assignment; such channel assign-

⁷In case No. 13,150.

ment to be made after completion of the proceedings in Docket No. 11532, or that the grant of the construction permit carry the condition that no construction be commenced until after the determination of proceedings in Docket No. 11532.

Said petition set forth facts demonstrating that irreparable injury would arise to the public and to O'Neill unless such relief was granted. In this petition, O'Neill took the position that since the Commission had refused to consider the merits of the petition for deintermixture, a stay of the VHF proceedings was still required since a determination that the authorization of VHF service in Fresno for the first time would serve the public interest was a necessary prerequisite to any grant on the VHF channel and furthermore that a VHF grant would constitute adverse action on the deintermixture request. In the event the Commission refused to grant the stay of the VHF channel proceedings pending a determination of the petition for deintermixture on the merits, it was requested in the alternative that O'Neill be permitted to intervene in the VHF proceedings in order to demonstrate to the Commission that the grant of a VHF station in Fresno would not serve the public interest. The facts upon which it based its standing were set out, as was a showing of good cause for late intervention as required by the Commission's Rules.

On January 12, 1956, the Commission granted the application of the California Inland Broadcasting Company, one of the two competing applicants in the VHF channel 12 proceedings; the Commission issuing a Decision and Memorandum Opinion and Order in connection with the matter. This decision and order is the subject of these proceedings before this Court [R. 3601, 3684].⁸ The

⁸In case No. 13,150.

grant was made without consideration of the merits of O'Neill's petition for deintermixture, and it denied the petition for intervention, consolidation and other alternative relief and dismissed as moot O'Neill's petition seeking a determination on the merits of making a VHF grant in Fresno prior to the making of such a grant. The decision and order had been stalemated for several weeks—two of the Commissioners being of the opinion that no grant should be made of a VHF channel until after the determination of the rule-making proceedings; three of the Commissioners favoring California Inland and two favoring a grant to the other applicant, KARM. This resulted in a vote of three in favor of a grant to California Inland and four opposed. In view of this situation, Commissioner Lee changed his vote from KARM to California Inland, not because of his determination of superior qualifications on the part of California Inland over KARM, but, as frankly stated by the Commissioner in his concurring opinion (supplement hereto), so as to avoid a voting impasse, and so as not to delay a "needed and vital service" to Fresno. Thus, a 4-3 decision was rendered on a determination, not on superiority of qualifications, but in effect on the question of (a) whether the grant should or should not have been held in abeyance in view of the voting position of the Commissioners, and in view of O'Neill's petitions and the rule-making proceedings; and (b) whether the additional VHF grant in Fresno was, in fact, a vital and needed service at this time. These are the very issues which O'Neill sought in every way possible to make a part of the proceedings, and upon which it sought to make a showing and be heard.

A majority of the Commission did not determine that the grantee was superior in comparative qualifications; the deciding vote was cast straightforwardly on the issue of placing a VHF grant now in Fresno as opposed to holding the grant in abeyance pending a determination

of whether it was in the public interest to make a VHF grant in Fresno. The decision did not make any findings that it was in the public interest to make a VHF grant in the light of the existing facts relating to the establishment of a first VHF service in Fresno, and no consideration was given to the fact that the Commission was creating an intermixture situation in Fresno.

Appellant is advised that no minutes of Commission actions are kept except those representing final action by the Commission. Hence, minute entries of the Commission reflecting the various votes prior to the final decision are not available. However, the concurring opinion of Commissioner Lee (supplement) gives a candid explanation of the matter.⁹

On December 15, 1955, O'Neill had filed a statement in the new rule-making proceedings instituted by the Commission in Docket No. 11532 in which it renewed its

⁹An authoritative trade publication has reported the unusual procedure in this manner:

Broadcasting-Telecasting, on December 12, 1955, reported: "WHA HOPPEN? FCC is embroiled in hot and unprecedented situation wherein its membership is split three ways, with litigation indicated unless it reconsiders. Case involves KFRE vs. KARM Fresno, Calif., competing for Ch. 12. Three commissioners (Webster, Doerfer, Mack) last Wednesday voted for KFRE; two (Chairman McConnaughey, Lee) were for KARM.

"Remaining two (Hyde, Bartley) argued for deintermixture rule-making, since Fresno presently has no vhfs, but were voted down. On nose count, latter two then voted against each applicant in support of deintermixture contention. Question: Do Hyde and Bartley votes mean 4-3 action against KFRE; or 5-3 vote against KARM, or should decision be 3-2 for KFRE with Hyde-Bartley position 'not participating'?"

Broadcasting-Telecasting, again reported, on December 26, 1955, as follows:

"STALEMATE. That Fresno Ch. 12 case is stymied, but good, and apparently will remain so until one or two FCC commissioners change vote. Several weeks ago Commission voted

request for deintermixture of Fresno. This document was filed pursuant to the statement made in the Order of November 10, denying the deintermixture petition without consideration on the merits. The statement filed in Docket 11532 also proposes deintermixture for Fresno and was pending before the Commission at the time of the grant of VHF channel 12, and is still pending.¹⁰ The action granting the VHF permit thus constitutes an adverse action on this petition and renders any ultimate decision thereon ineffectual.

The specific issues and matters which appellant sought to have the Commission determine prior to the grant of VHF construction permit and which are inherently involved in the determination of the question whether it is in the public interest to make the grant, and which the Commission should have considered prior to its peremptory denial of appellant's petition are set forth in appellant's petition for intervention, etc. [R. 3564, par. 15].¹¹

The materiality, importance and pertinence of the questions and matters raised were demonstrated to the Commission by the recitation of a series of facts which would have established, if found to be true, that a VHF grant

3-2 to grant KFRE and deny KARM, both Fresno. Comrs. Hyde and Bartley maintained position against making any grant in uhf area until allocations proceeding is over and decision on tv's future is resolved. Because they voted no to both applicants, question arose whether Ch. 12 applicants were denied. Advice of General Counsel Warren E. Baker was sought regarding law on split voting. He told commissioners, in essence, it had to have majority (four out of seven commissioners). Fresno case comes up again at first 1956 FCC meeting Jan. 4."

¹⁰On June 26, 1956, the Commission did issue a notice of proposed rule making, proposing to deintermix Fresno by deleting Channel 12 and assigning it to Santa Barbara, at the same time, making an additional UHF channel available to Fresno. The Commission, however, took no action with respect to the outstanding construction permit on Channel 12.

¹¹In case No. 13,150.

at Fresno would not be in the public interest, that irreparable injury to the public and to appellant would be done by making the VHF grant and by failure to deintermix the area prior to the grant of a VHF service; that a VHF service was not a needed service. These facts are set forth in appellant's petition [R. 3564]¹² at paragraph 16.

Statutes and Rules Involved.

Pertinent provisions of statutes and rules involved are set forth in the text of the brief and the supplement hereto.

Statement of Points and Summary of Argument.

1. The Commission's grant of intervenor's application for channel 12 at Fresno was void and unlawful by reason of the failure of the majority of seven Commissioners present to agree that it possessed the superior qualifications to serve the public interest.

2. The Commission's grant of intervenor's application for channel 12 was unlawful and void by virtue of a separate decision of a Commissioner, without whose vote there would be no majority action, which failed to make a determination on the basis of comparative considerations, but determined the matter outside of said issue, *i.e.*, on the basis of the need for the service, without necessary and adequate findings of fact to support such conclusion, without permitting appellant to make a showing or to be heard on that issue, and without consideration of any fact showing that the service to be established was not needed, and that the grant was not in the public interest.

¹²In case No. 13,150.

3. The Commission unlawfully granted intervenor's application for channel 12, at Fresno, without considering important public interest questions with respect to the desirability of authorizing a VHF service in the previously all-UHF Fresno area.

4. The Commission's grant to intervenor of its denial of appellant's request for consolidation, stay and intervention, and its postponement of consideration of the merits of appellant's deintermixture proposals deprived appellant of its right as permittee of a television station which would suffer economic interference from a VHF grant in the Fresno area, to be heard in opposition to such grant.

5. The Commission has deprived appellant of its right under Section 4(d) of the Administrative Procedure Act to a fair consideration of its rule-making proposals by taking final action in the related adjudicatory proceeding, in which appellant was not permitted to intervene, but which immediately affected adversely the feasibility and likelihood of adoption of appellant's proposals.

6. The Commission's whole course of action constituted reversible error in that it manipulated and perverted its processes so as to deprive appellant of its right under Sections 4 and 6 of the Administrative Procedure Act, Sections 1.701 and 1.702 of the Commission's Rules, and the due process clause of the Constitution.

7. The grant of intervenor's application prior to consideration of appellant's petition for deintermixture on its merits constituted a prejudgment of that petition in violation of Sections 1.701 and 1.702 of the Commission's Rules, Section 4 of the Administrative Procedure Act, and the due process clause of the Constitution.

8. The Commission's grant of intervenor's application deprived appellant, permittee of an existing station, which would suffer present economic injury from the grant, of its statutory right to a determination prior to that grant

on the merits, that the establishment of a first VHF service in Fresno would be inconsistent with the public interest.

NOTE: Since the petitions for review and the appeal herein were filed, this Court has rendered a decision in a group of cases (*Coastal Bend Television Co.*, appellant, *et al.*, Nos. 13034, 13035, 13038, 13039, 13056, 13057, 13058 and 13065) involving similar deintermixture questions as raised herein. This Court has thus ruled adversely to appellant's contentions as set forth in Points 4, 5, 6, 7 and 8 above. Appellant, therefore, bows to this decision, and refrains from re-arguing the points involved.

This statement is not to be construed, however, as an abandonment of said points for the reason that the consideration of those points in this case is distinguishable because of the concurring opinion of Commissioner Lee, a vote necessary to a majority decision, which was based on matters outside of the record, relative to the need for service in the public interest. It is appellant's position that not only does this render the decision void for lack of majority vote on issues of comparative qualifications, but that it creates a situation which, in the face of the previous denials of requests to be heard on the very issues, constitutes an abuse of discretion and a denial of due process. For this reason, appellant adopts the arguments already before the Court in the cases referred to. The arguments become particularly pertinent to the facts of this case, in view of the manner in which the final action in the VHF proceedings was taken. It is the cumulative effect of the denials plus the final action which results in the deprivation of due process. *Federal Broadcasting System, Inc. v. F. C. C.*, 225 F. 2d 560, 566 (App. D. C.), *cert. den.*, 350 U. S. 923 (1955).

ARGUMENT.

1. The Commission's Grant of Intervenor's Application for Channel 12 at Fresno Was Void and Unlawful by Reason of the Failure of the Majority of Seven Commissioners Present to Agree That It Possessed the Superior Qualifications to Serve the Public Interest.

Under the Communications Act of 1934, as amended, as under the common law, the majority of the Commissioners present must approve every finding, order or decision of the Commission. *Federal Broadcasting System v. F. C. C.*, 225 F. 2d 560, 565 (App. D. C.), *cert. den.*, 350 U. S. 923 (1955); *Rhode Island v. Palmer*, 253 U. S. 350; *St. Joseph Tp. v. Rodgers*, 16 Wall. 644; *Chicago R.R. Co. v. Commerce Commission*, 336 Ill. 51, 167 N. E. 840 (1929).

In the instant case, all seven of the Commissioners were present on January 12, 1956 when final action was taken purportedly approving the grant of VHF channel 12 to California Inland Broadcasting Co., intervenor herein. But less than a majority of the seven Commissioners present approved the grant on the basis of comparative qualifications—the only issue before the Commission. The facts disclose that Commissioners Webster, Doerfer and Mack voted to grant the application of California Inland Broadcasting Co. Commissioners Hyde and Bartley voted against a grant to either applicant, on the ground that it was not in the public interest to make a VHF grant to either at that time. Commissioner McConnaughey voted in favor of KARM, the opposing applicant in the VHF proceedings. Commissioner Lee, although favoring KARM on the basis of comparative qualifications, voted to grant the application of California Inland Broadcasting on the ground that “it is more in the public interest for me to concur in the majority opinion, finding

that the KFRE application should be granted . . . I am anxious to do my part to bring this needed and vital service to the people of the Fresno area without great loss of time. The latter factor—the need to bring a vital service without further lengthy delay—appears to me to be the overriding public consideration.” His concurring opinion, set forth in full in the supplement to this brief, demonstrates conclusively that his concurring vote for California Inland Broadcasting is a nullity. Although Commissioner Lee stated he was still of the opinion that KARM should be preferred on a comparative basis, he switched his vote to California Inland Broadcasting only to avoid “a voting impasse” and to bring a needed service. His concurrence, therefore, was not based on the issues specified in the comparative hearing, but was made on an issue outside of the record of the proceedings, *i.e.*, the public interest to be served by satisfying a need for the service, in effect saying that the public interest demanded the grant of *any* VHF applicant not necessarily the better qualified. *Cf. Plains Radio Broadcasting Co. v. F. C. C.*, 85 U. S. 48 (App. D. C.), 175 F. 2d 359 (1949); *Johnston Broadcasting Co. v. F. C. C.*, 85 U. S. 40 (App. D. C.), 175 F. 2d 351 (1949).

It is clear that on the issue of comparative merit, the Commission has not yet arrived at a majority decision in the VHF proceedings. The issues on comparative merit or qualification were the only issues upon which the hearing had been held. To determine that a grant was necessary on the basis of need involved an issue on a matter outside of the record. There was no evidence in the record concerning this need. Indeed, the Commission refused to permit appellant to be heard or to introduce any evidence at all on this very issue.

In *United States v. Abilene & Southern Railway Co.*, 265 U. S. 274, 290 (1924), Mr. Justice Brandeis, in speaking for the Supreme Court, held that “where matter

improperly treated as evidence may have been an important factor in the conclusions reached by the Commission" an order based thereon "must therefore, be held void." The identical situation, it is submitted, prevails here.

The cases uniformly hold that an administrative agency is required to exercise its own independent discretion and judgment in the discharge of its responsibilities under the statute. *Accardi v. Shaughnessy*, 347 U. S. 260 (1954); *Morgan v. United States*, 304 U. S. 1 (1937). This applies not only to the Commission acting as a unit in a duly assembled meeting but also to each individual Commissioner. The function of decision is a personal-deciding responsibility, *Sager v. Parker* (D. C. Mun., 1947), 55 A. 2d 349; there is a statutory duty imposed on each Commissioner, including Commissioner Lee, to make an independent appraisal of the evidence and reach independent conclusions based on the issues tendered by the comparative proceedings. *Kilgus v. Board of Estimate of City of New York*, 308 N. Y. 620, 127 N. E. 2d 705 (1955). Commissioner Lee cannot abdicate his personal-deciding responsibility in the case at bar and rely on the judgment of three other Commissioners solely to avoid a "voting impasse."

Joyce v. Bruckman, 257 App. Div. 795, 15 N. Y. S. 2d 679 (1939), is squarely in point. This was a proceeding brought to annul the revocation of a liquor license. The question before the Court was whether five Commissioners could make a determination when four of them relied exclusively on the decision made by the fifth member. The Court held that the decision of the Board was invalid since the former had abdicated and failed to exercise their administrative functions.

Commissioner Lee's concurrence was not based on an appraisal and consideration of the evidence. He frankly admits that his switch in voting was not based on the

comparative merits but to avoid a voting impasse. This is clearly an avoidance of his personal-deciding responsibility, hence his vote for California Inland is a nullity. Under such circumstances, a minority of the seven Commissioners granted the California Inland application. The Commission's action under such circumstances is void. *State v. Fagan*, 42 Conn. 32; *State v. Alexander*, 107 Ia. 177, 77 N. W. 841; *Codmon v. Crocker*, 203 Mass. 146, 89 N. E. 177; *Chicago R.R. Co. v. Commerce Commission*, *supra*.

When an appellate court reviews the proceedings of a lower court, "the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U. S. 238, 245 (1937). *However, this principle is not applicable to decisions of administrative bodies.* Here, if the wrong reason or ground is given for a conclusion, which, on its face, appears correct, such conclusion cannot be sustained upon judicial review. The Supreme Court has stated in *S. E. C. v. Chenery Corp.*, 318 U. S. 80, 95 (1943):

" . . . an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."

It is submitted that the Commission's grant of a license to intervenor cannot be sustained since an award ostensibly based on "merit" was actually, and wrongly, based on "need."

The Commission in its opposition to appellant's petition for interlocutory relief in this Court at page 8, note 9, dismissed this argument on the ground that the change in Commissioner Lee's position prior to final vote is irrelevant and that the courts will not probe the mental processes of an administrative agency.

It is elemental that "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based. In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct, 'although the lower court relied upon a wrong ground or gave a wrong reason.' *Helvering v. Gowran*, 302 U. S. 238, 245. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate. But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. If an order is valid only as determination of policy or judgment which an agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative order." *S. E. C. v. Chenery Corp.*, 318 U. S. 80, 87, 88 (1943).

Since Commissioner Lee has spread his reasons for concurring on the record, and has submitted a statement explaining the basis of his decision, there can be no probe of his mental processes. *Kilgus v. Board of Estimate of City of New York*, *supra*; *S. E. C. v. Chenery Corporation*, *supra*.

Screws v. United States, 325 U. S. 91, 113-134, cited by the Commission, is not in point. Mr. Justice Rutledge in his concurring opinion adopted the *rationale* of the majority opinion as set forth in the last two paragraphs of that opinion. Commissioner Lee repudiated

the *rationale* of the purported majority decision; his opinion was based on grounds of administrative expediency and to avoid a voting impasse. In adopting the conclusion of the purported majority, he abdicated his personal-deciding responsibility. His vote granting the application of California Inland is a nullity and thus invalidates the Commission's grant.

2. The Concurring Opinion of Commissioner Lee Is Unlawful Since It Prejudges the Merits of Appellant's Petition for Intervention Without Notice, Hearing and Findings of Fact and Conclusions of Law.

The petition for intervention filed by appellant specified among many other grounds the following issues:

1. The adequacy of the UHF services available in the Fresno area and the effect of a VHF grant on greater or less television service to Fresno;
2. the availability of program material and sources, and advertising revenues, including national, regional and local, and the effect of a VHF grant on the foregoing;
3. the impact and effect of a VHF grant in the Fresno area on the continued operation and survival of UHF stations;
4. the nature of the existing service in Fresno.

Commissioner Lee's concurring opinion prejudged the issues specified in the petition for intervention. His conclusion to grant the California Inland application in order to bring a needed and vital VHF service to Fresno prejudices the issue as to the adequacy of VHF service in Fresno. Had appellant been permitted to adduce evidence on this issue at the hearing, it would have shown the following:

- (1) the nature and character of all UHF services available in the Fresno area;

(2) the areas and populations served by existing licensees;

(3) the absence of any "white" areas, *i.e.*, that the rural areas receive adequate television services not only from Fresno but from other television stations located in other communities;

(4) the effect of a VHF grant in a UHF area, and the likelihood that a VHF grant would result in the extinction of UHF service.

Commissioner Lee's opinion consists of a bare conclusion without any evidentiary support in the record to sustain that conclusion. It impeaches and contradicts the issues specified in the petition for intervention, without notice, hearings, and findings of fact. *Johnston Broadcasting Co. v. F. C. C.*, *supra*; *Plains Broadcasting Co. v. F. C. C.*, *supra*.

Commissioner Lee's finding of need in the interest of the public could only be based on information acquired *ex parte* or by judicial notice. If he had in fact taken judicial notice, the facts known to each Commissioner were that the Fresno area was being served by two operating UHF stations servicing all the networks, and that a third station UHF was in existence and idle, as there was no need for its services although constructed and existing in a community owning only UHF receivers. But even if the Commissioner differed in his view, a finding could not be justified on the basis of judicial notice.

In the case of *Ohio Bell Telephone Company v. Commission*, 301 U. S. 292 (1937), the Ohio State Public Utilities Commission went outside the record and on the basis of the application of the doctrine of judicial notice altered the valuation of the telephone company's property, and thereby caused an order to be made which refunded substantial amounts of revenue to the company's cus-

tomers. Mr. Justice Cardozo, in striking down this use of judicial notice, declared:

"There has been more than an expansion of the concept of notoriety beyond reasonable limits. *From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown, there is no way to find them out.*" [at p. 302.] (Emphasis supplied.)

Neither was the Commissioner justified in basing his finding on evidence *ex parte*. Such would be clearly improper. (*Saltzman v. Stromberg-Carlson Telephone Manufacturing Co.*, 46 F. 2d 612, 614 (App. D. C., 1931).) A leading authority on administrative law has stated the matter cogently:

"One of the cardinal principles which should cover all adversary proceedings is that contained in the maxim: *audi alteram partem*. A decision based on *ex parte* evidence clearly does not conform to common law ideas of justice. . . ." (Schwartz, *Administrative Law*, 1947, ANN. SURV. AM. LAW, 220-227 (N. Y. U. School of Law).)

With Commissioner Lee's vote as stated above, there could be no majority vote in favor of Intervenor. Nor does it save the situation to attempt to sever Commissioner Lee's actions from those of the rest of the Commission. The Commission can only act as a unit. The improper action of Commissioner Lee taints the action of the whole and vitiates its decision. (*State v. Crane*, 36 N. J. L. 394; *Sanborn v. Fellows*, 22 N. H. 473 (1851); *Narragansett Racing Ass'n v. Kiernan*, 59 R. I. 90, 194 Atl. 692 (1937) (citing numerous decisions in accord).)

If the issue of need was sufficiently relevant to cause Commissioner Lee to switch his vote, even though he still believed that KARM was better qualified than Intervenor, it is sufficiently relevant to require the Commission to permit appellant as a party who was grievously and immediately affected by such findings to intervene and to be heard in opposition thereto. The refusal to admit such evidence is an abuse of discretion and contrary to "minimal Constitutional requirements." (*Pittsburgh Plate Glass Co. v. N. L. R. B.*, 313 U. S. 146, 177 (1941).)

The Supreme Court in *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 497 (1951), addressed itself to this point as follows:

"The trend in litigation is toward a rational inquiry into truth, in which the tribunal considers everything logically probative of some matter requiring to be proved."

The Commission cannot be permitted to deny appellant the right to intervene on the grounds that it is improper for appellant to show that the public interest would not be served by granting the license to either applicant in an adjudicatory hearing on the comparative merits of two applicants for a VHF license, and then turn about and determine that although there has been in fact no final determination by a majority vote on the issue of comparative merit, that intervenor should nonetheless receive the grant on the basis of *public need* for such service.

The concurring opinion of Commissioner Lee warrants comparison with the dissenting opinion of Commissioners Hyde and Bartley. The latter would permit intervention on the issues specified in order to save the UHF service from extinction. The dissenting opinion would permit intervention or the alternative relief requested by appellant in order to obtain a full determination of all relevant public interest issues.

The absence of any notice, hearings and findings of fact to sustain Commissioner Lee's opinion renders that decision void. Thus his concurrence must be disregarded in determining whether a majority of the seven Commissioners approved a grant to California Inland. Since only three out of seven Commissioners favored California Inland, the grant to KFRE is void.

It was to prevent just such abuses of administrative discretion that Mr. Justice Frankfurter laid down his *caveat* in *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 137-138, 143-144 (1940):

"In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for operation of stations 'public convenience, interest or necessity' was the touchstone for the exercise of the Commission's authority . . . the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interests.

". . . the laws under which these agencies [such as the FCC] operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing, and that judgment must express a reasoned conclusion. . . ."
(Emphasis added.)

The instant case, it is submitted, may be disposed of in favor of appellants by following the holding of this Court in *Channel 16 of Rhode Island, Inc. v. F. C. C.*, 229 F. 2d 520, 524 (App. D. C., 1956):

“Because of this failure of the Commissions to observe statutory procedure, it is necessary for us to hold its action in this case unlawful and to set it aside for that reason alone. . . .”

Conclusion.

For the foregoing reasons, the decisions and orders of the Federal Communications Commission herein involved should be reversed and the case remanded for further proceedings, in accordance with law.

Respectfully submitted,

JOSEPH BRENNER,

ARTHUR S. KATZ,

SAMUEL MILLER,

*Attorneys for O'Neill Broadcasting Co.,
Petitioner-Appellant.*

Dated: July 9, 1956.

SUPPLEMENT.

Concurring Opinion of Commissioner Lee.

(Dockets 9050 and 10650.)

[R. 3605-3683 In Case 13,150.]

I have examined the applications of KARM and KFRE and have found that the grant of either of them—were they not mutually exclusive—would be in the public interest.

The situation which confronted us before my present vote was that three commissioners favored KFRE and two KARM (Chairman McConnaughey and myself); the remaining two commissioners did not favor any grant at this time.

It is my personal opinion that such a situation provides a legal grant to KFRE. However, to avoid any question that a voting impasse has resulted, I believe that it is more in the public interest for me to concur in the majority opinion, finding that the KFRE application should be granted.

The Commission's original vote, if allowed to stand, would, in effect "freeze" the television situation in Fresno and the people of the area would be denied a service they have been waiting for since 1948; and it would likewise "freeze" the competing applicants who have spent much time and money prosecuting this case.

As in most of the remaining comparative cases, both the competing applicants can be expected to provide a television service in the public interest. While there are factors in this proceeding which inclined me toward KARM, the applicants are so nearly equal that on the basis of the proposals of each, I believe either would provide a meritorious service to the public, and I am satisfied to join the majority.

Pertinent Provisions of Statutes and Rules and Regulations Involved.

The pertinent provisions of the Administrative Procedure Act, 5 U. S. C. 1001 *et seq* are:

Section 4:

RULE MAKING.

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) *Notice*—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms of substance of the proposed rule or a description of the subjects and issues involved. Except where a notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporated the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) *Procedures*—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission

of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matters presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection.

(d) *Petitions*—Every agency shall accord any interested person the right to petition for the issuance, amendment, or appeal of a rule.

Section 6

ANCILLARY MATTERS.

Except as otherwise provided in this chapter—

(d) *Denials*—Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

Section 10

JUDICIAL REVIEW.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of Review*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and Venue of Action*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Reviewable Acts*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) *Interim Relief*—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other

writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) *Scope of Review*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, in abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determination the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

The pertinent provisions of Communications Act of 1934, as amended, 47 U. S. C. 151 *et seq.*

Section 303(g):

[The Commission shall]: Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio

in the public interest; [47 U. S. C. Sec. 303(g), 48 Stat. 1082 (1934)].

Section 307(a):

The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act [47 U. S. C. Sec. 307(a), 49 Stat. 1475 (1936)].

Section 307(b):

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same [47 U. S. C. Sec. 307(b), 49 Stat. 1475 (1936)].

Section 309(a):

If upon examination of any application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Section 309(b):

If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the

source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally.

* * * Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant."

Section 402(a):

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this Section) shall be brought as provided by and in the manner prescribed in Public Law 901, Eighty-first Congress, approved December 29, 1950.

Section 402(b):

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3) and (4) hereof.

(7) By any person upon whom an order to cease and desist has been served under Section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.

**PERTINENT PROVISIONS OF THE RULES AND REGULATIONS
OF THE FEDERAL COMMUNICATIONS COMMISSION:**

Section 1.388. Petitions to intervene. (a) Where the Commission has failed on its own motion to name as parties to a hearing any person specified in Section 1.387 (b), such person will be permitted to participate in the proceeding by filing a petition to intervene showing that he comes within the provisions of Section 1.387(b). Where the petition to intervene is based upon a claim

that a grant of the application would cause electrical interference to an existing station or a station for which a construction permit is outstanding within its normally protected contour as prescribed by the applicable rules and regulations, the petition must be accompanied by an affidavit of a qualified radio engineer which shall show either by reference to the standard broadcast Technical Standards of part 3 of this chapter or to actual measurements made in accordance with the methods prescribed therein that electrical interference will be caused to the existing station or station for which a construction permit is outstanding within the normally protected contour of the station.

(b) Any other person desiring to participate in the hearing may file a petition to intervene. The petition must set forth the interest of the petitioner in the proceedings, must show how such person's participation will assist the Commission in the determination of the issues in question, and must be accompanied by the affidavit of a person with knowledge as to the facts set forth in the petition. The Commission in its discretion may grant or deny such petition or may permit intervention by such persons limited to particular issues or to a particular stage of the proceeding.

(c) The granting of any petition to intervene shall not have the effect of changing or enlarging the issues specified in the Commission's notice of hearing unless the Commission shall on motion amend the same.

(d) Petitions to intervene under this section must be filed with the Commission not later than 15 days after the issues in the hearing have first been published in the Federal Register. Any person desiring to file a petition to intervene after the expiration of such 15 days must set

forth the reason why it was not possible to file the petition within the prescribed 15 days. Unless good cause is shown for delay in filing, the petition will not be granted.

Section 1.701:

Suspension, amendment or waiver of rules.—The rules and regulations of the Commission may be suspended, revoked, modified, amended or supplemented, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act. Any provision of the rules may be waived by the Commission, if good cause therefor exists.

Section 1.702:

Petition for amendment or waiver of rules.—Any interested person may petition for issuance, amendment, repeal or waiver of any rule or regulation. Such petition shall show the text of the proposed rule, or its change, and set forth the reason in support of the petition.

CONSTITUTION OF THE UNITED STATES.

Amendment V—Capital Crimes; Due Process:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

BRIEF FOR APPELLEE-RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

Nos. 13,113, 13,163

FILED

OCT 3 1956

O'NEILL BROADCASTING COMPANY, Petitioner

v.

Joseph W. Stewart

CLERK

UNITED STATES OF AMERICA,
FEDERAL COMMUNICATIONS COMMISSION, Respondents

CALIFORNIA INLAND BROADCASTING COMPANY, Intervenor

No. 13,164

O'NEILL BROADCASTING COMPANY, Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee

CALIFORNIA INLAND BROADCASTING COMPANY, Intervenor

ON PETITIONS FOR REVIEW AND APPEAL FROM ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT OF QUESTIONS PRESENTED

At a prehearing conference ordered by this Court, the parties stipulated the issues presented by these cases. With the exception of the note below, the issues, as stipulated, and subsequently approved by this Court on May 11, 1956, are as follows:

1. Whether the action of the Commission of January 12, 1956, in granting a VHF television station authorization to California Inland Broadcasting Company at Fresno, California, in a proceeding involving consideration of the comparative qualifications of two applicants was void.

a) by reason of the failure of the majority of the seven Commissioners present to agree that California Inland possessed the superior qualifications to serve the public interest;

b) by virtue of a separate decision of a Commissioner, without whose vote there would be no majority action, which failed to make a determination on the basis of comparative considerations, but determined the matter outside of said issues, i.e., on the basis of a need for the service, without necessary and adequate findings of fact to support such conclusion, without permitting appellant to make a showing or to be heard on that issue, and without consideration of any fact showing that the service to be established was not needed, and that the grant was not in the public interest.

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b) by virtue of a separate decision of a Commissioner, without whose vote there would be no majority action, which failed to make a determination on the basis of comparative considerations, but determined the matter outside of said issues, i.e., on the basis of a need for the service, without necessary and adequate findings of fact to support such conclusion, without permitting appellant to make a showing or to be heard on that issue, and without consideration of any fact showing that the service to be established was not needed, and that the grant was not in the public interest.

2. Whether the Commission's orders of November 10, 1955, denying appellant's rule making petition to revise the table of television allocations to delete VHF Channel 12 from commercial use in Fresno, California, and to substitute a UHF channel therefor.

a) erroneously rested the decision upon ex parte presentations on television allocations problems made to the Commission without affording appellant an opportunity to reply thereto;

b) erroneously failed to make necessary and adequate findings of fact; and

c) erroneously failed to state adequate reasons for the disposition of appellant's petition for deintermixture.

3.. Whether the Commission's orders of January 12, 1956, authorizing a first VHF television service in Fresno, constituted an unlawful prejudgment of appellant's rule making petition to make Fresno an all-commercial UHF area and a denial of appellant's right to fair consideration of requested amendments of the Commission's rules in violation of Section 4 of the Administrative Procedure Act, and Section 1.701 of the Commission's Rules.

4. Whether the Commission, by its disposition of appellant's rule making petition and its denial of appellant's requests for intervention, consolidation or stay, with respect to the proceedings in intervenor's application, arbitrarily and capriciously denied appellant an opportunity to demonstrate that the public interest would not be served

by the establishment of a first VHF station in Fresno.

5. Whether in granting intervenor's application for a construction permit for a television station, the Commission unlawfully failed to consider or pass upon issues affecting the public interest not part of the record in the licensing proceedings but presented to the Commission by appellant for its consideration.

Note: The parties other than the petitioner-appellant believe that issue No. 1 has not been properly raised for consideration by this Court, and that in any event, the issue, if properly raised, should read as follows:

1. Whether the action of the Commission of January 12, 1956, in granting a VHF television station authorization to California Inland Broadcasting Company at Fresno, California, in a proceeding involving consideration of the comparative qualifications of two applicants was void because of the considerations taken into account by Commissioner Lee, without whose vote there would be no majority action.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13,113, 13,163

O'NEILL BROADCASTING COMPANY, Petitioner

v.

UNITED STATES OF AMERICA,
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CALIFORNIA INLAND BROADCASTING COMPANY, Intervenor

No. 13,164

O'NEILL BROADCASTING COMPANY, Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee

CALIFORNIA INLAND BROADCASTING COMPANY, Intervenor

ON PETITIONS FOR REVIEW AND APPEAL FROM ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE-RESPONDENTS

JURISDICTIONAL STATEMENT

Case No. 13,113 is a petition for review of a Memorandum Opinion and Order released by the Commission on November 10, 1955, denying O'Neill Broadcasting Company's petition for rule making which sought to "deintermix" the commercial television assignments in Fresno, California, by reserving VHF Channel 12 for non-commercial educational use instead of UHF Channel 18. The petition is filed pursuant to Section 402(a) of the Communications Act of

1934, as amended, 47 U.S.C. 402(a), Sections 2, 3 and 4 of the Judicial Review Act of 1950, 5 U.S.C. 1032, 1033, 1034, Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, "and the Doctrine enunciated in Cohen v. Beneficial Industrial Loan Association, 337 U.S. 541." This case is properly before the Court as a jurisdictional matter.

Case No. 13,164 is an appeal from two separate orders. The first is a Decision adopted by the Commission on January 11, 1956, and released January 12, 1956, made after hearing and granting the application of California Inland Broadcasting Company for a construction permit for a new television broadcast station to operate on VHF Channel 12 at Fresno, California.^{1/} The second is a Memorandum Opinion and Order adopted and released on the same dates, dismissing as moot a petition filed by appellant on October 17, 1955, requesting a stay of a grant in the adjudicatory hearing pending completion of proceedings on appellant's rule making petition, and denying a petition filed by O'Neill on November 30, 1955, seeking, inter alia, consolidation of the adjudicatory proceeding with a general rule making proceeding instituted on November 10, 1955 (Docket No. 11532), or intervention, or a stay pending disposition of Docket No. 11532.

^{1/} This Decision also denied the competing application of KARM, The George Harm Station. The losing applicant has taken an appeal in Case No. 13,150, KARM, The George Harm Station v. Federal Communications Commission, now before this Court.

The appeal in Case No. 13,164 is filed pursuant to Section 402(b) of the Communications Act, 47 U.S.C. 402(b). For the reasons stated in the argument, infra, we believe that while Section 402(b) confers jurisdiction upon this Court over appeals from the orders sought to be appealed from in Case No. 13,164, appellant is prevented by Section 405 of the Communications Act, 47 U.S.C. 405 (see Appendix), from raising its alleged errors with respect to the grant to California Inland without seeking rehearing before the Commission. Case No. 13,164 should therefore be dismissed in part and otherwise affirmed for the reasons given in the argument, infra.

Case No. 13,163 is a petition for review of the same Memorandum Opinion and Order released January 12, 1956, which is appealed under Section 402(b) in Case No. 13,164.^{2/} This petition is filed in reliance upon Section 402(a) of the Communications Act, 47 U.S.C. 402(a), Sections 2, 3 and 4 of the Judicial Review Act of 1950, 5 U.S.C. 1032, 1033, 1034, Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, "and the Doctrine enunciated in Cohen v. Beneficial Industrial Loan Association, 337 U.S. 541." Appellant states (Br. 3-4) that it believes this Memorandum Opinion and Order to be appealable under Section 402(b), but that the applicability of Section 402(b) might be placed in question.

^{2/} Appellant's brief (p. 3) states that Case No. 13,163 also seeks review of the Commission's Decision of the same day granting California Inland's application. However, the Petition for Review in that case does not seem to raise the question.

We agree that Section 402(b) is the appropriate appeal section for this order.^{3/} Since such matters as the denial of intervention and a stay, while they may be separate final orders, involve the exercise of the Commission's licensing power, and are ancillary to the grant or denial of a construction permit, we believe that they are properly reviewable only under 402(b). See Federal Communications Commission v. National Broadcasting Co., (KOA), 319 U.S. 239; The Elm City Broadcasting Corp. v. Federal Communications Commission, ___ U.S. App. D.C. ___, ___ F. 2d ___ (No. 13002, decided June 14, 1956).^{4/} Examination of the legislative history of the Communications Act reveals a clear intent by Congress that Sections 402(a) and 402(b) should be mutually exclusive, and that Section 402(b) should cover all Commission action relating to licensing proceedings. See S. Rep. 44 on S. 658, 82nd Cong., 1st Sess., p. 11, 1 Pike & Fischer, R.R. 10:284. The alternative to this sound statutory scheme would be an

^{3/} We took this same position in Case No. 13,155, Gerico Investment Company v. United States, which has not yet been decided, and in Coastal Bend Television Co. v. Federal Communications Commission, ___ U.S. App. D.C. ___, 234 F. 2d 686, where the point was not decided.

^{4/} The Court there stated that it expressed no opinion on the question presented by the companion case, No. 12,542, The Elm City Broadcasting Corp. v. United States, as to whether denial of intervention could be appealed under Section 402(a) prior to a final grant. Case No. 12,542 was dismissed as moot because the merits of the denial of intervention were presented in Case No. 13,002, the appeal from the grant made in the proceeding in which Elm City had sought to intervene.

undesirable situation in which review of the grant of the permit would be in this Court in an action to which only the Commission is a party, while review of the other orders in the licensing proceeding (intervention, consolidation, stay, etc.) would be sought against the United States, within a different time, and perhaps even in a different Court of Appeals. It follows that judicial review of Commission broadcast licensing actions must be brought under 402(b). See Metropolitan Television Co. v. United States, 95 U.S. App. D.C. 326, 221 F. 2d 879. Therefore, Case No. 13,163 should be dismissed.

COUNTERSTATEMENT OF THE CASE

With the exception of the appellant's points with respect to the nature of the Commission's vote on the grant to California Inland Broadcasting Company (which we believe appellant is precluded from raising by Section 405 of the Communications Act), the relevant facts in this case present essentially the same situation which was before this Court in Coastal Bend Television Co. v. Federal Communications Commission, ___ U.S. App. D.C. ___, 234 F. 2d 686. In fact, appellant recognizes (Br. 14) that this Court's decision there constitutes a ruling adverse to it on the majority of the points sought to be raised here, and no attempt has been made by appellant to re-argue those points.

O'Neill, like the appellants in the Coastal Bend cases, is a UHF station which unsuccessfully sought rule making to deintermix the VHF and UHF channel assignments in a community (in this case, Fresno, California), and which also seeks review of a VHF grant in that community and of the Commission's denial of its requests for a stay of that grant and for intervention in the adjudicatory proceeding. In view of these facts, we believe that a concise statement of the factual background to O'Neill's appeal and its petitions for review will be of assistance to the Court and will make clear the similarity to the factual situations in the Coastal Bend cases.

On April 14, 1952, the Commission released the Sixth Report and Order in Docket Nos. 8736 et al. (Vol. 1, Part 3 Pike & Fischer, R.R. 91:599 - 91:1112) culminating a four year rule making proceeding. In that Report and Order the Commission adopted new rules for television broadcast stations and a new Table of Assignments of television channel allocations.^{5/} Seventy UHF (ultra high frequency) channels were made available for television broadcast use, in addition to the twelve VHF (very high frequency) channels formerly available. The Commission, for reasons detailed in the Sixth Report, assigned both UHF and VHF channels to most communities in the United States. Vol. 1,

^{5/} The Table of Assignments is contained in Section 3.606 of the Rules, 47 C.F.R. 3.606, 1 Pike & Fischer, R.R. 53:602 et seq.

Part 3 Pike & Fischer, R.R. 91:661 - 91:665. This use of both types of channels in one community is commonly called "intermixture".

The Table of Assignments allocated VHF Channel 12 and UHF Channels 18, 24, 47 and 53 to Fresno, Channel 18 being reserved for non-commercial, educational use. Appellant is the permittee of station KJEO on Channel 47. Its application for a construction permit, filed on August 25, 1952, was granted on April 8, 1953, and it commenced operation on October 1, 1953. Station KMJ-TV is in operation on Channel 24. Station KBID-TV has a permit for Channel 53, and was actually operating at one time but is not now operating. No permit or application is outstanding for Channel 18.

The competing applications of California Inland Broadcasting Company (California Inland) and KARM, The George Harm Station (KARM) for Channel 12 were designated for hearing on August 20, 1953 (R. 232-233)^{6/} The Examiner handed down his Initial Decision on September 9, 1954 (R. 3266-3327), oral argument before the Commission

^{6/} References to "(R. ____)" in this brief are to material contained in the record filed in KARM, The George Harm Station v. Federal Communications Commission, Case No. 13,150, which has been incorporated as part of the record herein. References to "(R.S. ____)" are to material contained in the remainder of the record filed herein. It has been agreed among the parties, with the approval of the Court, that the briefs will contain references to the original record, and that the printed Joint Appendix will contain its own consecutive page numbers as well as the record page reference for the material printed therein.

was held on December 17, 1954, and the Commission adopted its final decision granting the application of California Inland and denying that of KARM on January 11, 1956 (released January 12, 1956) (R. 3601-3604).

On March 31, 1955, the Commission instituted rule making proceedings on five deintermixture proposals which had been submitted to it relating to other communities.^{7/} (Docket Nos. 11238, 11333, 11334, 11335, 11336; 13 Pike & Fischer, R.R. 1511.) The purpose of these five "pilot" proceedings was to determine whether a uniform policy could be reached as to the desirability and advisability of "selective" deintermixture, i.e., deintermixture in particular communities where not more than one commercial VHF station had as yet commenced operation. On April 7, 1955 (which was some eight months after the Examiner's Initial Decision in the comparative hearing for Channel 12 between California Inland and KARM), O'Neill filed a petition for rule making in which it sought to deintermix Fresno by making VHF Channel 12 an educational channel and removing the educational reservation from UHF Channel 18 (R.S. 1-4). It also asked that the final decision in the adjudicatory hearing concerning Channel 12 be made subject to the final outcome of the proceedings in this matter. Oppositions to this petition were filed by the two

^{7/} "Deintermixture", generally speaking, is a revision of channel assignments by which one of the two types of channels is removed from a community.

applicants for Channel 12 (R.S. 6-13 and R.S. 14-21). A letter in opposition to the petition was also submitted by the Central California Educational Television Committee (R.S. 22). O'Neill filed a reply to this letter (R.S. 26-33), and the Central California Educational Television Committee also filed a further reply to O'Neill's reply (R.S. 34-44).^{8/}

On October 17, 1955, O'Neill filed a further petition asking that final action in the adjudicatory proceeding (in which oral argument had been heard on December 17, 1954) be held in abeyance pending final determination of the petitions of O'Neill and another party^{9/} relating to Channel 12 (R.3545-3555). This petition was opposed by California Inland (R. 3556-3563).

On November 10, 1955, the Commission adopted a Memorandum Opinion and Order,^{10/} in which it denied the "pilot" petitions seeking deintermixture of particular communities. On November 10, 1955, the Commission also adopted a separate Memorandum Opinion and Order denying the petition for deintermixture filed by O'Neill and a number of other parties, with respect to which no notices of proposed rule making had

^{8/} O'Neill filed a motion to strike this reply or, in the alternative, for leave to submit an additional rejoinder which was submitted therewith (R.S. 46-55); this motion was opposed by the Central California Educational Television Committee (R.S. 56).

^{9/} Station KBAK-TV, Bakersfield, California, had filed a petition seeking to delete Channel 12 in Fresno and insert it in Bakersfield, California.

^{10/} 13 Pike & Fischer, R.R. 1511.

been issued (R.S. 57-61).^{11/} These petitions, on which no rule making proceedings had been held, were denied for essentially the same reasons as the petitions in the "pilot" cases, in which notices of proposed rule making had been issued, comments received and oral argument held.^{12/} This ground was basically that the problems involved could not be approached on the basis of separate petitions relating to an individual community or a limited area, but must be approached on a nationwide basis.^{13/}

11/ 13 Pike & Fischer, R.R. 1522.

12/ It may be noted here, in view of appellant's statement that its deintermixture proposal was denied "without hearing or other process" (Br. 5), that the Coastal Bend decision, supra, involved the denial of deintermixture petitions in both categories, i.e., both those with respect to which rule making proceedings had been held and those which were denied without such proceedings upon the basis of the policy set forth in the five "pilot" cases.

13/ O'Neill states (Br. 6, 7) that the Commission's order of November 10, 1955, did not pass on its requests for a stay of the adjudicatory proceeding and that it can only assume that a denial of the stay was also included. However, the requests for a stay made prior to the November 10, 1955, order denying deintermixture were moot, as the Commission held in its January 12, 1956, order with specific reference to the request for a stay contained in O'Neill's October 17, 1955, pleading. A stay in the adjudicatory proceeding had been requested pending final action on the deintermixture petition. The stay request was moot because the deintermixture petition was denied on November 10, 1955, without any decision having been rendered in the adjudicatory proceeding.

That the November 10, 1955, action denying O'Neill's petition for rule making was a final action is shown by this Court's dismissal as moot of that portion of a petition for review in another case which sought review of an order denying a request for a stay pending action on a rule making request which was also denied on November 10, 1955. In that case, too, no decision in the adjudicatory proceeding had been rendered when the rule making petition was denied. See this Court's order of March 9, 1956, in Case No. 13020, Storer Broadcasting Co. v. United States.

The Commission simultaneously, on November 10, 1955, adopted a Notice of Proposed Rule Making instituting a new general rule making proceeding to receive suggestions for a nationwide improvement of the allocation table (Docket No. 11532; 20 F.R. 8501; 1 Pike & Fischer, R.R. 53:573 - 575). A detailed discussion of the many possibilities for solving the broad overall problem appears in this notice. Emphasis was given to the fact that the Commission at this time was not interested in individual city assignments, but rather in arriving at the best nationwide plan. The notice thus stated, "At a later date, when the Commission has determined the general nature of any revisions to the present allocation scheme which it would be desirable to adopt, it will then be in a better position to consider comments relating to specific channel assignments proposed for individual communities."

On November 30, 1955, O'Neill filed a petition to consolidate the adjudicatory proceeding with the new rule making proceeding (Docket No. 11532), or to permit it to intervene in the adjudicatory proceeding, or for stay of the adjudicatory proceeding pending resolution of Docket No. 11532, also asking that a grant in the adjudicatory proceeding, if made, be conditional (R. 3565-3578). This pleading was opposed by California Inland (R. 3579-3586). O'Neill filed a reply to this opposition (R. 3593-3599).

On January 11, 1956, the Commission adopted a Memorandum Opinion and Order, released January 12, 1956, denying O'Neill's October 17, 1955, request for a stay as moot and also denying the November 30, 1955, petition for intervention, consolidation and a stay (R. 3601-3604).^{14/} On the same day the Commission adopted its final Decision in the adjudicatory hearing making a grant to California Inland (R. 3605-3683). The Petition for Review in Case No. 13,113 was filed on January 9, 1956, and the Petition for Review and Notice of Appeal in Case Nos. 13, 163 and 13,164 on February 10, 1956. A stay was denied by this Court on March 2, 1956.

On June 25, 1956, the Commission terminated its general rule making proceeding in Docket No. 11532 by announcing its basic approach in the deintermixture problem and by selecting 14 areas in which it proposed new "interim reallocations." One of the communities selected was Fresno, California, where the Commission proposed the deletion of Channel 12 (Docket No. 11759). This proceeding is still pending before the Commission.

^{14/} Similar orders denying intervention, consolidation, and requests for stays pending final resolution of the general rule making proceeding in Docket No. 11532 were also appealed in the Coastal Bend cases.

SUMMARY OF ARGUMENT

The Commission believes that the Court has jurisdiction over Case No. 13,113. However, this case, in which review is sought of the Commission's Memorandum Opinion and Order of November 10, 1955, denying petitioner's request for deintermixture, raises substantially the same issues decided by this Court in Coastal Bend Television Co. v. Federal Communications Commission, ____ U.S. App. D.C. ____, 234 F. 2d 686. Since petitioner does not in fact re-argue these matters, they are not argued further in this case.

Case No. 13,163 is a petition for review of the Commission's Order of January 12, 1956, denying petitioner's request to intervene in the adjudicatory hearing on Channel 12 in Fresno, for a stay, etc. This petition should be dismissed because it is filed under Section 402(a) of the Communications Act, whereas review of all Commission licensing actions must be sought under Section 402(b).

Case No. 13,164 is an appeal filed under Section 402(b) of the Communications Act from the Grant of a construction permit for Channel 12 to California Inland Broadcasting Co. and from the denial of the requests of O'Neill mentioned above to intervene in that proceeding, for a stay, etc. The Commission's denial of similar late requests was sustained by this Court in the

Coastal Bend cases, and the point is not re-argued by O'Neill here. Since the Commission properly rejected the request to intervene, O'Neill was not a party to the proceeding in which the grant was made (nor entitled as of right to be one) and cannot raise its objections to the Commission's vote making that grant because it did not petition the Commission for rehearing. Section 405, Communications Act of 1934, as amended, 47 U.S.C. 405. In any event, California Inland received a proper majority vote.

ARGUMENT

THIS CASE IS GOVERNED BY THE COASTAL
BEND DECISION TO THE EXTENT THAT ANY
QUESTIONS ARE PROPERLY RAISED.

With the exception of the points attempted to be raised concerning the nature of the Commission's vote in the decision making a grant to California Inland, O'Neill concedes in its brief (Br. 14) that its contentions here have been decided adversely to it in Coastal Bend Television Co. v. Federal Communications Commission,
____ U.S. App. D.C. ____, 234 F. 2d 686.^{15/} It does not

^{15/} This concession, made with reference to what O'Neill denominates its Statement of Points (Br. 12-14), does not include its Point 3. However, Point 3 is the same as its Point 8. Both points claim that a grant was made without consideration of questions which should have been considered before a grant was made, and the concession does include Point 8. Furthermore, both points are directed to Issue No. 5

attempt to re-argue those matters, and we shall not do so here.

In view of appellant's concession and its failure to make any argument on any of the other points, the sole remaining point is appellant's contention that Commissioner Lee's vote was invalid and rendered the Commission's Decision invalid.^{16/} This argument pertains to Issue No. 1 of the stipulated issues. As the note accompanying the stipulation of issues among the parties^{17/} states, the Commission does not believe this issue to be properly raised.

While appellant now claims that the nature of Commissioner Lee's vote prevented California Island from receiving a valid majority vote, it is precluded from

15/ (Cont'd.) - of the stipulated issues; this same issue was presented as Issue No. 4 in Case No. 13,034, Coastal Bend Television Co. v. Federal Communications Commission, supra, and was also decided adversely to O'Neill's position in that decision.

16/ We note, additionally, that appellant urges that this case is distinguishable from the Coastal Bend cases even with respect to the matters decided in those cases, because Commissioner Lee allegedly cast his vote on the basis of an issue not in the adjudicatory proceeding, i.e., the need for the new service (O'Neill Br. 14). While we believe appellant has misunderstood the nature of Commissioner Lee's vote in this respect, we think it clear that a possible error on this score would go only to appellant's points 1 and 2 and not to any of its other points, all of which were decided in the Coastal Bend decision.

17/ The stipulated issues are set forth as the questions presented in both appellant's brief and this brief.

raising this point by Section 405 of the Communications Act, 47 U.S.C. 405, on two grounds. The first is that no such claim was first made to the Commission and O'Neill cannot raise it upon appeal without having presented it to the Commission in a petition for rehearing. The ~~record~~^{second} is that since O'Neill was not a party to the proceeding in which the grant was made, it cannot appeal that grant without having filed a petition for rehearing. Section 405 explicitly raises these two jurisdictional obstacles to O'Neill's attempt to challenge the validity of the Commission's vote on the grant to California Inland. It provides in pertinent part:

The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such decision, order, or requirement, /a decision, order, or requirement "made by the Commission in any proceeding" except where the party seeking such review (1) was not a party to the proceedings resulting in such decision, order, or requirement, or (2) relies on questions of fact or law upon which the Commission has been afforded no opportunity to pass. (Matter in brackets added - taken from earlier portion of Section 405. See the full text in the Appendix hereto.) 18/

18/ While either the fact that an appellant was not a party in the proceeding before the Commission or is raising questions on which the Commission was afforded no opportunity to pass, is sufficient to preclude review in the absence of a petition for rehearing, appellant O'Neill is precluded from seeking review of Commissioner Lee's vote for California on both scores, as we show in the text.

Thus, on the first aspect of the matter, Section 405 provides that where the appellant "relies on questions . . . of law upon which the Commission has been afforded no opportunity to pass," the filing of a petition for rehearing is a condition precedent to judicial review. O'Neill filed no such petition and did not present to the Commission its present claim that California Inland did not receive a valid majority vote. It cannot urge that claim upon this Court in the first instance. United States v. L. A. Tucker Truck Lines, 344 U.S. 33; Democrat Printing Co. v. Federal Communications Commission, 91 U.S. App. D.C. 72, 78, 202 F. 2d 298, 303-304. As this Court said in the Democrat Printing Co. case, "Since appellant has denied the Commission the first opportunity to state its views on the errors now being asserted, appellant cannot seek here the relief which it should have sought initially before the Commission."

Furthermore, on the second aspect, a petition for rehearing was a jurisdictional requisite to any appeal from the grant to California Inland because O'Neill was not a party to the proceeding in which the grant was made. For Section 405 also requires a petition for rehearing as a condition precedent to judicial review where the appellant "was not a party to the proceedings resulting in such decision. . ." That appellant was not a "party"

to the proceeding in which a grant was made to California Inland is clear from Section 2(b) of the Administrative Procedure Act, 5 U.S.C. 1002(b).^{19/} That Section defines party as one "properly seeking and entitled as of right to be admitted as a party," and this Court held in the Coastal Bend decision that similarly situated UHF stations seeking to intervene late in similar adjudicatory hearings for VHF channels were not entitled to do so.

Therefore, there is no question but that O'Neill cannot now raise its alleged errors in the grant to California Inland. It did not seek rehearing, was not a party to the proceeding in which the grant was made, and is seeking, in addition, to raise questions of law not first raised before the Commission.

This is a jurisdictional defect in O'Neill's notice of appeal, which therefore must be dismissed. However, Commissioner Lee's vote was, in any event, perfectly proper.

Commissioner Lee joined in the majority decision, explaining in a concurring opinion (R. 4291) that he was concerned with the possibility of a voting impasse, that

^{19/} Section 2(b) of the Administrative Procedure Act provides

in pertinent part, "'Party' includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes."

he was satisfied that either of the applicants would provide a meritorious service to the public, and that, although there were factors in the proceeding which inclined him toward KARM, he was satisfied to join the majority.^{20/}

While the test of the validity of a Commission decision is its reasonableness and support in the record, Johnston Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 40, 175 F. 2d 351; Scripps-Howard Radio, Inc. v. Federal Communications Commission, 89 U.S. App. D.C. 13, 189 F. 2d 677, cert. denied 342 U.S. 830, appellant has made no argument to show that the majority decision in favor of California Inland in which Commissioner Lee joined was arbitrary or improper. That the desire to avoid a possible voting impasse played a part in his decision clearly does not invalidate his vote. See Mr. Justice Rutledge's vote in Screws v. United States, 324 U.S. 91, 113-134; see also Klapprott v. United States, 325 U.S. 601, 619; Maryland Casualty Co. v. Cushing, 347 U.S. 409, 422-423; Faris v. Ewing,

^{20/} The contention that Commissioner Lee's vote was invalid has also been advanced in Case No. 13,150, KARM The George Harm Station v. Federal Communications Commission, now before this Court. The Commission has answered the contention more fully there, although it believes the appellant in that case is also barred from raising the contention by Section 405 of the Communications Act.

183 S.W. 280, 287 (Sup. Ct. Mo.).

CONCLUSION

For the foregoing reasons, the Commission should be affirmed in Case No. 13,113 on the authority of Coastal Bend Television Co. v. Federal Communications Commission, ___ U.S. App. D.C. ___, 234 F. 2d 686; Case No. 13,163 should be dismissed for lack of jurisdiction; and Case No. 13,164 should be dismissed for lack of jurisdiction insofar as it is an appeal from the decision making a grant to California Inland Broadcasting Company, and affirmed on the authority of Coastal Bend Television Co. v. Federal Communications Commission, supra, insofar as it is an appeal from the Commission's Memorandum Opinion and Order released January 12, 1956 denying appellant's request for intervention, consolidation,

21/ Appellant's additional argument on the merits, that Commissioner Lee made a finding outside the record of need for the VHF service (O'Neill Br. 20-25), misconceives his opinion. Commissioner Lee clearly did not purport to make a finding of fact, but merely stated his view that a service on VHF Channel 12, which had been allocated to Fresno since 1952, should not be delayed. The Commission had determined that a freeze on authorizations for new stations would not be in the public interest, a determination found to be within the Commission's discretion in the Coastal Bend decision, and Commissioner Lee did no more than express his concern that an impasse in the vote would prevent the rendition of the additional service.

stay, etc., of the adjudicatory proceeding.

Respectfully submitted,

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The United States joins in this brief insofar
as it applies to Case Nos. 13,113 and 13,163.

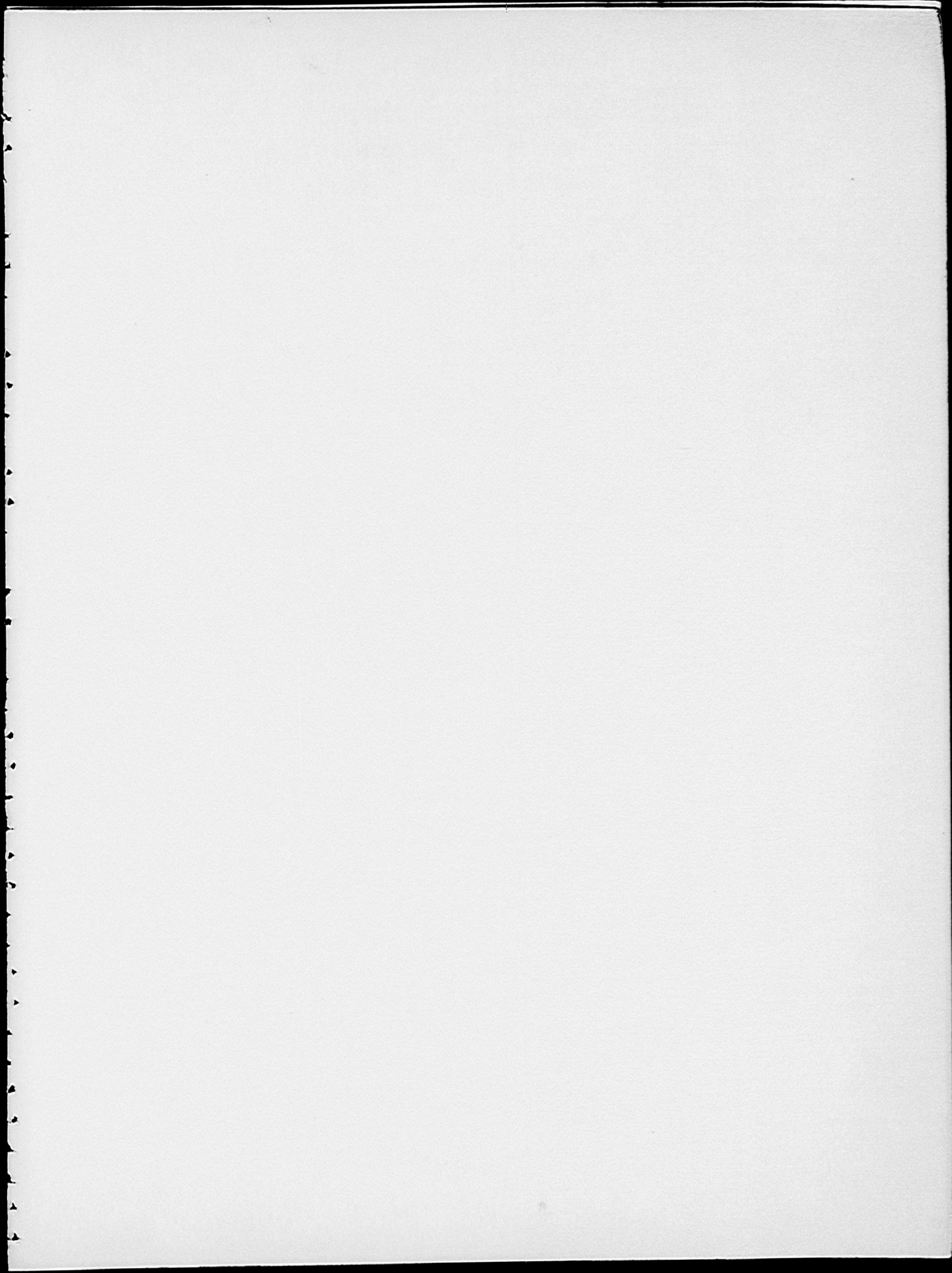
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October 3, 1956

APPENDIX

Section 405. After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing; and it shall be lawful for the Commission, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. Petitions for rehearing must be filed within thirty days from the date upon which public notice is given of any decision, order, or requirement complained of. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such decision, order, or requirement, except where the party seeking such review (1) was not a party to the proceedings resulting in such decision, order, or requirement, or (2) relies on questions of fact or law upon which the Commission has been afforded no opportunity to pass. Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. The time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402(b), shall be computed from the date upon which public notice is given of orders, disposing of all petitions for rehearing filed in any case, but any decision, order, or requirement made after such rehearing reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order.



BRIEF FOR INTERVENOR

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13,113 and 13,163

O'NEILL BROADCASTING Co., *Petitioner*

v.

UNITED STATES OF AMERICA AND FEDERAL
COMMUNICATIONS COMMISSION, *Respondents*
CALIFORNIA INLAND BROADCASTING COMPANY, *Intervenor*

No. 13,164

O'NEILL BROADCASTING Co., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
CALIFORNIA INLAND BROADCASTING COMPANY, *Intervenor*

**On Petitions for Review and Appeal From Decision and Orders
of the Federal Communications Commission**

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October, 1956

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

OCT 3 1956

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Joseph W. Stewart

CLERK

INTERVENOR'S STATEMENT OF QUESTIONS PRESENTED

Intervenor subscribes to the "Statement Of Questions Presented" in the Federal Communications Commission's Brief, which is in accordance with the prehearing order issued by this Court on May 11, 1956.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13,113 and 13,163

O'NEILL BROADCASTING Co., *Petitioner*

v.

UNITED STATES OF AMERICA AND FEDERAL
COMMUNICATIONS COMMISSION, *Respondents*
CALIFORNIA INLAND BROADCASTING COMPANY, *Intervenor*

No. 13,164

O'NEILL BROADCASTING Co., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
CALIFORNIA INLAND BROADCASTING COMPANY, *Intervenor*

**On Petitions for Review and Appeal From Decision and Orders
of the Federal Communications Commission**

BRIEF FOR INTERVENOR

COUNTERSTATEMENT OF THE CASE

The case is fully and fairly stated in Respondent-Appellee's counterstatement of the case. Accordingly, that counterstatement is adopted by Intervenor.

SUMMARY OF ARGUMENT

In the unanimous *en banc* decision in the recent *Coastal Bend* cases, this Court, decided, adversely to Appellant's* position, every single point raised in the instant appeal, except its challenge to the validity of the vote. And the latter point is not properly an issue in this appeal since the Commission was not afforded an opportunity to pass upon it, as required by Section 405 of the Act. Moreover, Appellant's attack on the vote has no merit.

Regardless of his initial inclination to favor Intervenor's opponent in the comparative proceeding, and regardless of his reasons for changing his mind, the fact is that Commissioner Lee ultimately cast his vote for Intervenor and expressly concurred in the majority opinion. His expressed desire to avoid a deadlock which would prevent immediate effectuation of the 1952 allocation plan is immaterial.

ARGUMENT

I. The Coastal Bend Decision Is Dispositive of All of Appellant's Points Except the Alleged Invalidity of the Vote

The basic question presented in Appellant's Points 3 through 8 is whether or not the Federal Communications Commission may lawfully grant an application for a VHF television channel in Fresno, California, as provided in its 1952 table of allocations notwithstanding the pendency of a rule-making proceedings to consider, *inter alia*, whether or not changes in the allocations table should be made.

Appellant has conceded (Br. 14) that in the recent unanimous *en banc* decision in *Coastal Bend Television Co. v. Federal Communications Commission* (No. 13034, et al, decided June 7, 1956), this Court ruled adversely to Appellant's Points 4, 5, 6, 7 and 8. It is clear that its Point 3 (Br. 13) was also determined in that decision, for, as the

* O'Neill Broadcasting Co., the Petitioner in Nos. 13,113 and 13,163 and the Appellant in No. 13,164 will be referred to as the "Appellant."

Court stated, "an adjudication that conforms to the 1952 allocation is valid . . .". Accordingly, any argument on Appellant's Points 3 through 8 would be superfluous.

II. Commissioner Lee's Vote for California Inland Cannot be Successfully Challenged

The only matter presented in this appeal which is not common to the *Coastal Bend* decision is Appellant's argument with respect to the validity of Commissioner Lee's vote. This contention must be rejected without reaching the merits. The issue which Appellant is attempting to urge is not properly before this Court since it not only involves "questions of . . . law upon which the Commission has been afforded no opportunity to pass" but Appellant "was not[even] a party to the proceedings resulting in such decision . . ." Thus, the express statutory condition precedent to judicial review of this issue—namely, the filing of a petition for rehearing with the Commission under Section 405 of the Act—has not been satisfied.¹

Even if Points 1 and 2 were properly before the Court, Appellant could not prevail since there is no merit to its contention.² Commissioner Lee's position was this: Although he was inclined initially to favor Intervenor's opponent in the comparative hearing, he felt that the two applicants were so evenly matched that either would operate a television station in the public interest. Since a greater number of his fellow Commissioners favored Inter-

¹ 47 U.S.C. 405; *United States v. Tucker Truck Lines*, 344 U.S. 33 (1952); *Federal Power Commission v. Colorado Interstate Gas Co.*, 348 U.S. 492 (1955); *Democrat Printing Co. v. Federal Communications Commission*, 91 U.S. App. D.C. 72, 78, 202 F. 2d 298, 303 (1952).

² The same argument was made by the Appellant in *KARM v. Federal Communications Commission*, which is now pending in this Court (No. 13,150).

venor than its opponent and the latter could not win even with Commissioner Lee's vote, he was satisfied to join the majority and concur in its reasons for selecting Intervenor as the winner. In that way, he could assure beyond any question that the paramount public interest consideration, namely, bringing a new television service to Fresno, would be effectuated.

Regardless of his initial inclination and regardless of his motives for his ultimate choice, the fact remains that in the final decision of the Commission (which is the only decision under review in this Court) he cast his vote squarely for California Inland and expressly concurred in the majority opinion. In affirming the grant to California Inland, this Court will be upholding the Commission upon "the grounds upon which the agency acted" and thus will completely satisfy the standard of the *Chenery* case³ upon which Appellant mistakenly relies (Br. pp. 18-19).

There is no requirement of law that each Commissioner must write an individual opinion. Consequently, if Commissioner Lee had merely stated that he concurred in the opinion of the other three Commissioners who favored California Inland without announcing publicly his reasons for shifting from his original views, Appellant could not complain. It acquired no greater rights because Commissioner Lee candidly reiterated his opinion, previously manifested in the November 10, 1955 Report and Order, that immediate implementation of the 1952 table of allocations was required in the public interest.

Appellant accuses Commissioner Lee of having made an *ex parte* finding of need for additional service without notice and hearing and of having pre-judged the UHF-VHF controversy (Br. pp. 20-25). This will be recognized as the same argument that was made against the Commission and rejected by this Court in the *Coastal Bend* cases. The

³ *Securities and Exchange Commission v. Chenery Corporation*, 318 U.S. 80 (1943).

public interest judgment as to the need for a VHF service in Fresno on Channel 12 was properly reached in the 1952 Report and Order. And, as the Court stated: "The Commission's decision to adhere to the 1952 allocation for the time being, as reflected in its refusal to institute a 'freeze' on construction permits for VHF stations to prevent competition with existing UHF stations, is well within its statutory authority." Understandably, Commissioner Lee thought it would be anomalous for the comparative proceeding to eventuate in no VHF service at all to Fresno even though five of the seven Commissioners agreed with both applicants that immediate implementation of the 1952 table of allocations was required in the public interest.

It is immaterial that a deadlock and consequent "freeze" of new service might have resulted if Commissioner Lee had adhered to his original disposition in the comparative hearing. It is not unusual for judicial bodies to render decisions based upon the votes of members who arrive at their decision for different, and sometimes diametrically opposite, views, and even merely to break a deadlock. The opinion of Mr. Justice Rutledge in *Screws v. United States*⁴ is illustrative of this practice. Other good examples are *Klaprott v. United States*,⁵ and *Maryland Gas Co. v. Cushing*.⁶ No less flexibility should be attributed to an administrative agency than to a court, particularly when, as in the case of the Commission, the touchstone of its action is the broad concept of public interest, convenience and necessity.

Appellant's argument that Commissioner Lee's vote was a nullity because he allegedly did not pass upon the comparative merits of the competing applicants proves too much. If Appellant were right, the same conclusion would follow with respect to the votes of Commissioners Hyde and Bartley. In that event, only four Commissioners (con-

⁴ 325 U.S. 91, 134 (1945).

⁵ 335 U.S. 601 (1949).

⁶ 347 U.S. 409 (1954).

stituting a quorum⁷) would have cast "valid" votes. Having received the votes of three of those four Commissioners, Intervenor would still have the requisite majority.⁸

CONCLUSION

For the foregoing reasons, and those stated in the Respondent-Appellee's brief, in which Intervenor joins, the decision and orders of the Commission should be affirmed.

Respectfully submitted,

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October, 1956

⁷ Sec. 4(h) of the Communications Act of 1934 as amended, 47 U.S.C. 154 (h).

⁸ The Commission frequently renders decisions by a 3-to-2 or 3-to-1 vote (E.g. *WHEC*, 10 Pike and Fischer RR 521, 3-to-1; *Oregon Television, Inc.*, 9 Pike and Fischer RR 1401, 3-to-2; *Tribune Publishing Co.*, 7 Pike and Fischer RR 222, 3-to-1).

REPLY BRIEF FOR PETITIONER-APPELLANT

IN THE United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT

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O'NEILL BROADCASTING CO.,

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On Petitions for Review and Appeal From Decision and
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*United States Court of Appeals
For the*

District of Columbia Circuit

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On Petitions for Review and Appeal From Decision and Orders of the Federal Communications Commission.

REPLY BRIEF FOR PETITIONER-APPELLANT.*

Summary of Argument in Reply.

Appellee concedes that Section 402(b) of the Communications Act, 47 U. S. C. 402(b), confers jurisdiction upon this Court over the appeals in Case No. 13,164 from two separate orders of the Commission:¹ The Decision released January 12, 1956, granting the applica-

*For convenience Petitioner-Appellant will hereinafter be referred to as "Appellant" and Appellee-Respondent as "Appellee."

¹Brief for Appellee, pages 3, 4.

tion for VHF television construction permit at Fresno on comparative considerations and the Memorandum Opinion and Order released on the same day, which (a) dismissed Appellant's petition for stay of the grant in the comparative hearing pending completion of proceedings on Appellant's rule-making petition and (b) denied Appellant's petition which sought a consolidation of the comparative hearing proceedings with the general rule-making proceedings previously instituted, or intervention on the part of Appellant or a stay pending disposition of the rule-making proceeding.

Appellee argues, however, in which it is joined by Intervenor, that Appellant is precluded from raising certain issues by Section 405 of the Communications Act, 47 U. S. C. 405. It is claimed this section requires Appellant to have sought a rehearing before the Commission prior to the taking of an appeal.

In making this argument, Appellee and Intervenor overlook several important aspects of the matter:

1. Assuming, *arguendo*, that Appellant was required to petition for rehearing prior to appeal, such requirement was obviated, in fact made legally impossible of performance, when the Commission lost jurisdiction over the matter prior to the expiration of time in which the request for rehearing could have been made under Section 405, through the filing of a Notice of Appeal to this Court by the unsuccessful party to the comparative hearing, as more specifically set forth at a later point in this brief.

2. If Appellant's position is correct that the action of the Commission in granting the VHF television authori-

zation was void by reason of the failure of a majority of the seven commissioners present to agree on the superior qualifications of one of the applicants and by reason of the separate decision of one of the Commissioners made in the manner characterized in Appellant's brief, then such action was void *ab initio* and Appellant cannot remedy the void character of such an order by failure to request rehearing, even if it be assumed Appellant were required to do so.

The defects in the Decision are jurisdictional and Appellant did not cure these defects nor confer jurisdiction by failure to request a review, even though such were otherwise required of it and it were possible to have done so.

3. In any event, Appellant meets those provisions of Section 405 which do away with the requirement of request for rehearing prior to the taking of appeal, *i.e.*, Appellant was actually a party to the proceeding and the Commission had an opportunity to pass upon the issues raised on this appeal. The Appellant was a party before the Commission by virtue of the simple fact that the Commission treated with the Appellant as a party, rendering a Memorandum Opinion and Order, which, except for dismissal of one petition, passed on the merits of Appellant's contentions. Furthermore, it is clear from Commissioner Lee's concurring opinion that the problem of voting was before the Commission. In fact, the very nature of the voting process itself requires the Commission inherently to consider its vote and the voting arrangement.

ARGUMENT IN REPLY.

I.

Section 405 of the Communications Act Does Not Operate to Preclude Appellant's Appeal for the Reason That the Commission Was Ousted of Jurisdiction Prior to the Expiration of the Time in Which a Rehearing Petition Could Have Been Filed.

Under Section 405 of the Communications Act, petition for rehearing must be filed within 30 days from the date upon which public notice is given of any decision, or order complained of. The decisions and order complained of were released on January 12, 1956. Thus, the 30-day period within which Appellant could have filed a petition for rehearing would have expired on February 11, 1956.

On February 1, 1956, KARM, the George Harm Station, the unsuccessful party to the comparative hearing, whose application was denied on January 12, filed Notice of Appeal from the Decision of the Commission which Appellant herein attacks. Appellant did not file its Notice of Appeal until February 10, 1956.

On the filing of the Notice of Appeal by KARM on February 1, the Commission lost jurisdiction of the matter and could not have passed on Appellant's petition for rehearing if it should have availed itself of the remaining period within which it could have filed a petition. It is established that on perfection of an appeal to a higher court, the lower court is ousted of jurisdiction. *United States v. Goodwin*, 11 U. S. 108, 110 (1812); *Lockman v. Lang*, 132 Fed. 1, 4 (8th Cir., 1904). The same principle applies to situations where a court is vested by statute with the right to make a judicial review of ad-

ministrative action. *Fed. Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266, 275-278 (1933); *Rochester Telephone Corp. v. United States*, 307 U. S. 125 (1939).

So final was the act of the Notice of Appeal in closing the Commission's records and its doors to review on behalf of this Appellant that the certified record of the Commission filed in this appeal proceeding shows as a final entry the Notice of Appeal of KARM, not even the Notice of Appeal and Petition for Review of this Appellant being noted therein [R. 4292], although it is quite clear from the records of this Court that such Notice of Appeal and Petition for Review were timely given and filed.

II.

Appellant's Appeal Is Not Precluded by Section 405 of the Communications Act for the Further Reason That the Nature of the Decision Renders It Absolutely Void and as Such Is Not Cured by Failure, if Such It Was, of Appellant to Exhaust Administrative Remedies.

Appellant has in its opening brief discussed the nature of the Commission's decision and has urged that the decision was void and unlawful. If this Court upholds such contention and finds that the Commission action was void, it is so for all purposes and remains so despite any failure on the part of Appellant to seek rehearing of the opinion. It is not necessary to cite authority for the proposition that an order which is absolutely void cannot be cured by silence or acquiescence of any of the parties. If Appellant prevails in its contention as to the void character of the Decision, it must perforce prevail on this appeal, despite any provision of Section 405, which might require prior review procedures.

III.

Appellant Was in Fact a Party to the Proceedings Before the Commission and the Commission Inherently, by Its Voting Action, Considered the Issues Now Raised. Hence, Appellant Is Not Precluded From the Appeal by Section 405.

Under Section 405 rehearing requirements must be satisfied before the taking of an appeal only where the appealing party was not a party to the proceedings or, although a party, it relies on questions of fact or law upon which the Commission has been afforded no opportunity to pass. The Appellant was a party to the proceedings before the Commission because it was treated with and as a party by the Commission. The Commission rendered a Memorandum Opinion and Order, which, while it dismissed as moot one of Appellant's petitions, treated the other petition on its merits. To this end, it released a separate Memorandum Opinion and Order bearing the caption and docket numbers of the comparative hearing [R. 3601 and 4208].

Section 405 does not require "a party to the proceedings" to be a named party or admitted party. The term does not appear to be defined and lacking such a definition a fair interpretation requires that when the Commission deals with a person in all respects as a party to the proceedings, considers his contentions and rules upon those contentions, setting forth reasons for the rulings, that person has become a party to the proceedings for the purposes of Section 405.

The definition of "party" contained in the definitions of "person and party" in Section 2(b) of the Administrative Procedure Act cited by Appellee is inapplicable. Such definitions are set forth for the purpose of defining

the terms in *that* Act as specifically stated in Section 2: "As used in this Act." In any event, the definition in Section 2(b) does not purport to be exclusive but employs language only of inclusion.

The Commission in concluding its deliberations considered the nature of the votes of its members. Commissioner Lee candidly reports in his concurring opinion on the problems confronting him on the exercise of his vote. It is inherent by the very nature of the acts that the Commission had an opportunity to pass on the matters now raised, and as appears from the concurring opinion, exercised this opportunity in this matter on more than one occasion. Commissioner Lee also states in his concurring opinion that he had a legal opinion on the validity of the voting. The fact that the Commission, or individual Commissioners, may not have reached a correct or valid conclusion does not destroy the patent fact that the body not only had the opportunity of passing on the question, but did in fact pass upon it.

The obvious purport of the language of Section 405 is to give the Commission the same opportunity to pass upon matters extrinsic to its considerations as it has in those intrinsic to its deliberations. This opportunity it had. The matter was quite apparent to all the Commissioners. That the Commission might have handled it differently following a request for a review is immaterial. The Commission did in fact have the opportunity to pass upon it when its members voted as they did.

Appellee and Intervenor endeavor to minimize the effect of Commissioner Lee's Opinion, by characterizing it as one concurring in the conclusions of the purported majority opinion. In doing so, they do violence to the expressed language of the concurring opinion. Commissioner Lee stated that he was joining the majority only

to get out an opinion and to fulfill a need for service, in view of the fact that either applicant could render a service in the public interest and were "nearly equal." He did not say, as Appellant contends he must have said in order to result in a valid majority opinion, that he concurred in the conclusion that KFRE possessed the superior qualifications.

As far as he was willing to go in this direction was:

"While there are factors in this proceeding which inclined me toward KARM [the unsuccessful applicant], the applicants are so nearly equal that on the basis of the proposals of each, I believe either would provide a meritorious service to the public, and I am satisfied to join the majority."²

But it is often the small difference—one being not quite equal to the other—which determines whether a grant will be made or denied. In many comparative television hearings both applicants are highly qualified. Either would render a high type of service in the public interest, but unfortunately, the Commission must choose one, and the preference many times is of hairline proportions. It is obvious that Commissioner Lee was unwilling to go as far as to say that KFRE was superior in qualifications to KARM.

Appellant concedes that if Commissioner Lee had simply made a general statement of concurrence as is frequently done, without expressing the basis for his concurrence, there would have been no question as to the validity of the majority opinion. By implication his general concurring statement would have been taken as a concurrence in the result of the others, *i.e.*, the superior

²Commissioner Lee's Concurring Opinion is reprinted in the supplement to Appellant's Opening Brief.

qualifications of KFRE. But the Commissioner chose instead to spread his reasons on the record and it is clear from a reading of the whole opinion that he chose to do so in order to express, not a concurrence in the superior qualifications of KFRE, but the fact that in his opinion KFRE was only slightly behind KARM and would still render a meritorious service in the public interest. Cases have been cited in Appellant's brief that where an administrative order is based on an improper reason or ground for a conclusion, a conclusion cannot be sustained on judicial review. As stated by the Supreme Court in *S. E. C. v. Chenery Corp.*, 318 U. S. 80, 95 (1943):

" . . . an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."

Intervenor's argument on pages 5 and 6 of the Brief for Intervenor that the Appellant's same argument of invalidity would apply to the dissenting opinion of Commissioners Hyde and Bartley and would result in only an aggregate of four Commissioners having cast valid votes is a specious one. Obviously a question of counting "valid votes" is not involved. What is necessary is a concurrence of the majority of the Commissioners present in finding the superior qualifications of one of the applicants. The fact that certain of the votes might be negative, whether by dissent or improper concurring opinion, would not destroy the requirements for the affirmative vote of a majority of those present on the issues before the Commission. In any event, the dissenting votes of Commissioners Hyde and Bartley were within the issues as presented to the Commission. In effect these Commissioners voted to grant the relief requested by Appellant.

Conclusion.

The Decision and Order of the Federal Communications Commission herein involved should be reversed and the case remanded for further proceedings, in accordance with law.

Respectfully submitted,

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Dated: October 29, 1956.

